(26,292)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 825.

DETROIT & MACKINAC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

FLETCHER PAPER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

INDEX.

	Original.	Print
Transcript of record from the circuit court of Bay county	*a*	1
Index of exhibits	*a*	1
Index of exceptions	*m*	6
Calendar entries	*p*	8
Declaration	1	9
Rule to plead	15	18
Plaintiff's bill of particulars	15	18
Motion to dismiss for want of jurisdiction	16	19
Demand for more specific bill of particulars	17	20
Demurrer to declaration	18	20
Amendment of declaration, &c.	20	21
Order denying motion to dismiss and exception	22	23
Motion for change of venue	23	23
Affidavit of James McNamara	24	24
Opinion overruling demurrer	25	25
Reasons for denying motion for change of venue	31	29
Order denying change of venue	32	29

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	Original.	Print
Exception to order, &c.	32	29
Order overruling demurrer	33	30
Application for writ of certiorari and denial thereof	33	30
Clerk's certificate as to certiorari, &c.	34	31
Plea and notice	35	31
Amended plea and notice	36	32
Exception to overruling of demurrer	48	39
More specific bill of particulars	49	40
Stipulation annexed to bill of particulars	52	42
Stipulation for consolidation of cases	55	43
Stipulation as to evidence and trial	57	44
Bill of exceptions	60	46
Testimony of Allan M. Fletcher	96	65
Testimony of Henry E. Fletcher	99	67
Schedule	121	78
Testimony of Malcolm Wellington	125	79
Exhibit 3—Statement, shipment by Fletcher Paper Co.	128	80
Testimony of Warren Penniman	135	84
Exhibits 34 and 35—Interest statements, &c.	137	85
Colloquy between court and counsel	143	88
Testimony of Allan M. Fletcher (recalled)	147	91
Statement of defense and motion to dismiss	151	93
Stipulation continuing injunction	191	114
Offer of proofs	199	119
Motion to elect	203	121
Stipulation for election of remedy	205	122
Opinion, Coumans, J. (November 13, 1916)	206	123
Conclusions of law	209	124
Findings of fact	211	126
Instructions for entry of judgment	212	126
Motion for double damages	212	127
Exceptions by defendant to opinion and findings, &c.	213	127
Requests for findings of fact and conclusions of law	215	128
Plaintiff's requests for findings of fact	233	139
Additional findings of fact	234	139
Colloquy between court and counsel	240	142
Rulings on defendant's requests to modify and add to opinion, findings, &c.	246	145
Judgment, &c.	251	148
Exceptions to denial of double damages	251	148
Exceptions to opinion, findings of fact, &c.	253	149
Motion for new trial, notice, &c.	265	157
Testimony of James McNamara	271	160
Hearing on motion for new trial	297	176
Exceptions to denial of motion for new trial	309	182
Plaintiff's assignment of errors	311	183
Assignment of errors by Railway Co.	312	184
Judge's certificate to bill of exceptions	351	207
Record of exhibits	352	208
Index to exhibits	353	208

	Original.	Print
Exhibit 1—(Described)	363	212
1 A—Defendant's tariff, M. R. C. 205	365	213
1 B—Defendant's tariff, M. R. C. 208	366	214
1 C—Complaint No. 1 of Fletcher Paper Co., February 23, 1909	367	215
1 D—Answer of Detroit Railway & Mackinac Co. to complaint, Exhibit 1 C	372	218
1 F—Complaint No. 2 of Fletcher Paper Co., March 11, 1909	378	221
1 G—Answer of Detroit & Mackinac Ry. Co. to complaint, Exhibit 1 F	381	224
Exhibit A—Letter, Fletcher Paper Co. to Luce, &c., March 9, 1909	388	228
1 H—Complaint of Gilchrist *et al.*, April 19, 1909, &c.	389	229
1 I—Answer of Detroit & Mackinac Ry. Co. to complaint, Ex. 1 I	394	232
1 J—Order of Michigan Railroad Commission, October 19, 1909	395	233
1 K—Order of Michigan Railroad Commission, October 22, 1909	397	234
1 L—Supplemental order of Railroad Commission, November 3, 1909	399	235
1 N—Bill of complaint filed by Detroit & Mackinac Ry. Co. in Wayne circuit court	401	237
Order to show cause	406	240
Restraining order	408	241
Injunction	409	242
1 P—Stipulation of December 2, 1909, as to injunction, &c.	411	243
1 X—Opinion of Michigan Railroad Commission, November 15, 1909	413	244
1 Y—Opinion of circuit judge	416	246
1 Z—Decree of Wayne county court	434	256
1 AA—Complainant's motion for rehearing and proceedings thereon	436	257
8 B—Bill of complaint, August 17, 1912	444	262
8 C—Demurrer of Fletcher Paper Co. *et al.*, filed September 5, 1912	448	264
Order of argument and submission	453	267
Opinion, Ostrander, J.	454	268
Judgment	462	283
Petition for writ of error	463	284
Citation and service	475	293
Bond on writ of error	476	294
Assignment of errors	477	295
Writ of error	491	305
Clerk's certificate	494	307

COPY

a to e *Exhibits.*

A separate record of Exhibits applicable to this case and to the four companion cases, tried with this case, all being calendar numbers 10211, 10216, 10220, 10211, 10221 has been printed and contains an index showing where each exhibit is found in the main record, and in the record of Exhibits; also where the same appears (if at all) in the printed record of the so-called Rate Case; complying with the supreme court Rule 36, we are placing in this record an index of such exhibits as follows:

No. of exhibit.	Name and brief substance of exhibit.	Page main record.	Page exhibit record.
1	Printed record in the rate case, being case decided by the supreme court and reported in 171 Mich. 335.....	74	363-365
1-*a*.	Tariff of rates published by defendant known as M. R. C. 205, dated Jan. 20, 1909, effective Feb. 1, 1909	74	365-366
1-*b*.	Tariff of defendant M. R. C. 208, dated Feb. 8, 1909, effective Feb. 20, 1909	75	365-367
1-*c*.	Complaint No. 1 of Fletcher Paper Co., dated Feb. 23, 1909, alleging discrimination in log rates between points on defendant's railroad, and praying for a uniform tariff of rates	76	367-371
1-*d*.	Answer of defendant to complaint No. 1 of Fletcher Paper Co., (Ex. 1-*c*), alleging reasons for denial of relief sought	76	372-378

f

1-*e*.	Local freight tariff of date March 3, 1909, switching charge between Alpena and Fletcher Dam	76	378

No. of exhibit.	Name and brief substance of exhibit.	Page main record.	Page exhibit record.
1-*f*.	Complaint No. 2 of Fletcher Paper Co. of March 11, 1909 designated as D-179, praying for injunction preventing enforcement of freight tariff G. F. D. 573, relative to switching tariff between Alpena and Fletcher Dam..	77	378-381
1-*g*.	Answer of defendant to Ex. 1-*f*, alleging reasons for denial of relief	77	381-389
1-*h*.	Complaint of Gilchrist et al., April 19, 1909, alleges defendant discriminated against Alpena and in favor of Cheboygan on log rates in violation of M. R. C. 208...	78	389-393
1-*i*.	Answer of defendant to the complaint of Gilchrist et al., alleging reasons for denial of relief	78	394-395
1-*j*.	M. R. C. order (D-189), Oct. 19, 1909, set forth in declaration	79	395-396
1-*k*.	M. R. C. order (D-188), Oct. 22, 1909, set forth in plaintiff's declaration	80	397-399
1-*l*.	M. R. C. supplemental order, (D-188) declared on by the plaintiff	82	399-401
1-*m*.	Proof of service of orders Exs. 1-*j*, 1-*k*, 1-*l*	83	401
g			
1-*n*.	Bill of complaint filed by defendant, Wayne circuit ct. to review orders, Exs. 1-j, 1-*k*, 1-*l*	83	401-406
1-*o*. Deft's Ex. 1.	Order to show cause by Judge Mandell, Wayne circuit judge, why injunction prayed for in Ex. 1-*n* should not be granted	85	406-407
Deft's Ex. 1-*a*.	Proof of service of order to show cause	272	407-408
Deft's Ex. 2.	Restraining order	273-74	408-409
Deft's	Injunction from Wayne circuit		

No. of exhibit.	Name and brief substance of exhibit.	Page main record.	Page exhibit record.
Ex. 3.	court addressed to Mich. R. R. Com. restraining it from putting into operation or making effective orders Exs. 1-*j*, 1-*k*, 1-*l*	275-276	409-412
Deft's	M.R.C. 199, M.R.C. 237, being tariff of rates on logs between Alpena and Cheboygan, being rates effective on Jan. 15, 1909, corrected by rates effective June 1, 1909.....	285-288	
Deft's Ex. 5.	Decree of Wayne circuit ct. with endorsements showing original decree as prepared providing for dissolution of injunction (Def'ts Ex. 3) but such provision was stricken out before signed by judge	290-291	
Plff's Ex. 1-*p*.	Stipulation between Mr. McNamara and Atty. Gen. relative to continuance of restraining order (Deft's Ex. 2)	85	412
1-*q*.	Petition of Fletcher Paper Co. to intervene in Wayne chancery proceedings to review M. R. C. orders.....	86	412
1-*r*.	Petitions of Gilchrist, Churchill Lumber Co., Island Mill Co. to intervene in Wayne chancery proceedings to review M. R. C. orders.....	86	412
1-*s*.	Order authorizing intervention of parties last named.....	86	413
1-*t*.	Answer of M. R. C. to bill of complaint in Wayne cir. ct..	86	413
1-*u*.	Answer of Fletcher Paper Co. as interveners to bill of complaint	87	413
1-*v*.	Answer of F. W. Gilchrist as intervener to bill of complt.	87	413
1-*w*.	Certificate of Wayne circuit judge referring proceedings back to M. R. C.....	87	414
1-*x*.	Report or certificate of M. R. C. following re-submission of case to them by Wayne circuit court	87-88	414-416

No. of exhibit.	Name and brief substance of exhibit.	Page main record.	Page exhibit record.
1-*y*.	Opinion of Judge Murfin on hearing of cause in Wayne circuit court	88	416-435
1-*z*.	Decree of Wayne circuit ct. dismissing bill and affirming orders of M. R. C.	89	436
1-*aa*.	Motion for rehearing and statement of counsel with reference to rehearing	90	437-442
2.	Printed copy of arguments for complainants in Wayne circuit court	74	442
3.	Brief for complainant and appellant in supreme court on hearing of case reported 171 Mich. 335	74	442
4.	Brief for intervening complainants and appellants in supreme court	74	443
5.	Brief of Atty. Gen. for defendant M. R. C. in sup. ct.	74	443-444
6.	Brief of Gillett & Clark for intervening defendants in the same case	75	444
7.	Opinion of supreme court reported 171 Mich. 335	90	444
8.	Printed record in supreme ct. of U. S., case reported 235 U. S. 402	90	445
8-*a*.	Decree of supreme court pursuant to opinion 171 Mich. 335	90	445
8-*b*.	Bill of complaint filed Aug. 17, 1912, in U. S. court, east. dist., Mich. south. div.	91	445-449
8-*c*.	Demurrer of Churchill Lumber Co., Fletcher Paper Co., Gilchrist and Island Mill Co. to bill of complaint in U. S. ct.	91	449-450
8-*d*.	Demurrer of M. R. C. to bill of complaint in U. S. court	91	450
8-*e*.	Objections, affidavits, etc., of Fletcher Paper Co., et al. to application for preliminary injunction	91-92	450

j

No. of exhibit.	Name and brief substance of exhibit.	Page main record.	Page exhibit record.
8-*f*.	Answer of M. R. C. on application for injunction.....	92	451
8-*g*.	Opinion of U. S. Dist. Ct., 203 Fed. 864	92	451
8-*h*.	Order of Dist. Ct. U. S. denying injunction dated Mar. 22, 1913	92	451
8-*i*.	Motion of M. R. C. to dismiss the bill of complaint filed April 4, 1913.....	92	451
8-*j*.	Motion of Fletcher Paper Co. to dismiss bill of comp.....	92	451
9.	Motion to dismiss, etc., filed in U. S. ct. Sept. 24, 1914....	93	452
10.	Brief of appellant D. & M. Ry. Co. in opposition to motion..	93	452
11.	Brief of D. & M. Ry. Co. in U. S. court on main hearing..	93	452
12.	Brief for appellees in same case	93	452
13.	Supplemental brief for appellant in same case.....	93	452
14.	Opinion of supreme court of Mich. granting mandamus, reported 182 Mich. 234.....	93	452
15.	Record in case reported Mich. Sup. Co. 182 Mich. 234....	93	452
16.	Brief for relators in same case	93	452
17.	Brief of respondent in same case	93	452

k

18.	reply brief for relator in same case	93	452
19.	Reply brief for respondents in same case	93	452
20.	Brief of Atty. Gen. in same case	93	452
21.	Opinion of U. S. supreme ct. reported 235 U. S. 402	93	453
22.	Decree of Dist. Court dated Dec. 28, 1914	94	453
23.	Opinion of Supreme court, Feb. 4, 1914, reported 183 Mich. 242	94	453
24-26.	Records and briefs in last case	94	453
27.	Opinion of supreme court, case reported in 185 Mich 649..	94	453

No. of exhibit.	Name and brief substance of exhibit.	Page main record.	Page exhibit record.
28-34.	Motions and briefs in last case	94-95	453
39.	Articles of association of Fletcher Paper Co., dated April 18, 1898	96	
40.	Expense bills used in making bill of particulars in Fletcher Paper Co. case	96	
41.	Bill of particulars of Fletcher Paper Co.	98	
42.	Stipulation to bill of particulars in Fletcher Paper Co. case	98	
43.	Depositions taken Oct. 22, 1916, in Fletcher Paper Co. case	99	
H. E. F. Dep. Ex. 1.	Pamphlet Tech, Assn Pulp and Paper Industry	101	
H. E. F. Dep. Ex. 2.	Plaintiff's record books	132	
W. P. Dep. E7. 34-35.	Interest computations by periods on claim of plaintiff	137-42	
M. W. Dep. Ex. 3.	Stmt. of expense bills of logs shipped by rail 1909-1914	128	
M. W. Dep. Ex. 4.	Shipping books used by shipping clerk in billing out paper shipments	130	
H. E. F. Dep. Sched. Ex.	Schedule of logs received, 1909-1914, by river and rail, shipments of paper, etc.	121-124	

Exceptions.

To overruling demurrer and to order so overruling Demurrer (Assignments of Error 1 and 15) 25-31, 33
To opinion of Judge Collins overruling such Demurrer (Assignments of Error 2 and 3) 25-32
To Errors of court in opinion overruling Demurrer (Assignments of Error 4 to 14 inclusive) 25-31
To overruling and denying motion for Change of Venue, and error in ruling in order thereon (Assignments of Error 16, 18 and 19) 32
To order of court denying Motion to Dismiss for .....
To error of court in not complying with Circuit want of jurisdiction (Assign- of Error 17) 22
To ruling receiving in evidence Ex. 1-*j* (Assignment of Error 20) (Ex. R. 34-35) 79
To ruling admitting in evidence Ex. 1-*k* (Ex. R. 36-38) (Assignments of Error 21 and 22) 80-81

To ruling receiving in evidence Ex. 1-L (Ex. R. 38-40) (Assignment of Error 23) 82-84
To ruling receiving in evidence Ex. 1-*x* (Ex. R. 32-34. Assignments of Error 24) 87-88
To overruling and denying Motion to Dismiss Plaintiff's action and direct a verdict for defendant (Assignments of Error 25-26) 151-202, 206-212
To error of court in deciding Orders 1-*k* and 1-L were in force before decision of Michigan Supreme Court, July 25, 1914 (Assignment of Error 27) 206-212
n To denying Motion to submit further evidence (Assignment of Error 28) 206-212
To findings of fact and conclusions of law in court's opinion made and filed Nov. 13, 1916 (Assignments of Error 29 to 37 inclusive) 206-212
To error of court *ni* not complying with Circuit Court Rule 45 (Assignment of Error 38) 215-232
To error of court in not passing specially upon defendant's requests 1 to 30 inclusive and 32 to 44 inclusive (Assignments of Error 39 to 79 inclusive) 246-250
To error of court in signing and filing Additional Findings of Fact prepared by plaintiffs' counsel (Assignment of Error 80) 234-239
To error of court in 31, 32, 34 and 35th Additional Findings of Fact (Assignments of Error 81 to 85 inclusive) .. 238-239
To error of court in denying defendant's application for new trial, and errors in decision on motion for new trial (Assignments of Error 86 to 93 inclusive) 265-309
To error of court in deciding plaintiff was entitled to judgment, and in entering judgment (Assignment of Error 94) 245-251
To ruling that common law action of assumpsit not taken away by statute (Assignment of Error 95) .231, 244, 247, 250
o To ruling that Act 300 of the public Acts of 1909 gives additional rights and remedies but creates no new form of action (Assignment of Error 96) 209
To ruling that rates named in orders M. R. C. became effective twenty days after service thereof (Assignment of Error 97) 210
To ruling that defendant's delay in posting and filing its schedule of tariff rates, or the pending litigation, or stipulation of Attorney General did not change conclusions that commission orders were effective (Assignment of Error 98) 210
To error of court in deciding plaintiff can recover differential rebate (Assignment of Error 99) 210, 211
To error of court in deciding that orders are conclusive proof that rates collected by the defendant were excessive (Assignment of Error 100) 206, 212
To error of court in deciding that the facts found by it supported its conclusions of law (Assignment of Error 101) 206, 212

p *Calendar Entries.*

1915.

April 3. Declaration filed.
April 12. Proof of service filed.
April 24. Demand for bill of particulars filed.
April 26. Bill of particulars filed.
April 27. Affidavit filed.
April 27. Default filed.
May 4. Motion to set aside default filed.
May 5. Motion to dismiss filed.
May 7. Def't's demand for more specific bill of particulars filed.
May 12. Demurrer filed.
May 18. Amended declaration filed.
May 20. Motion to dismiss for want of jurisdiction denied.
May 27. Motion for change of venue filed.
June 5. Affidavit in opposition to change of venue filed.
June 30. Reason for overruling demurrer filed.
June 30. Reasons for denying motion for change of venue filed.
July 7. Præcipe for entry of order with proof of service filed.
July 7. Præcipe for entry of order with proof of service filed.
July 7. Motion for change of venue denied.
July 7. Demurrer overruled.
July 21. More specific bill of particulars filed.
July 23. Plea and notice filed.
Oct. 30. Notice of exceptions filed.
Nov. 1. Notice of exceptions filed.
Dec. 31. Stipulation filed (as to facts contained in bill of particulars).
Dec. 31. Stipulation filed (for consolidation of cases).

q

Dec. 31. Bill of particulars filed.

1916.

March 30. Stipulation filed.
May 15. Motion, etc., for continuance filed.
June 22. Motion, notice and aff-davit filed.
July 11. Stipulation filed.
Sept. 6. Amended plea and notice filed.
Sept. 8. Amended plea filed.
Sept. 27. Motion filed (motion to elect).
Sept. 30. Stipulation filed (to file briefs on election of remedy).
Nov. 13. Opinion filed.
Nov. 15. Motion to double damages filed.
Nov. 16. Exceptions to findings of circuit judge filed.
Nov. 27. Motion for double damages denied.
Nov. 27. Judgment, $25,788.76.
Nov. 27. Stay granted, 20 days; bond filed, 60 days.
Nov. 27. Plaintiff's exceptions to denial double damages filed.
Nov. 27. Plaintiff's request for additional findings of fact filed.

Nov. 27. Additional findings of fact filed.
Nov. 27. Ruling on defendant's request for additional and modified finding of fact filed.
Nov. 27. Amendment and additional request filed.
Nov. 27. Defendant's requests filed.
Dec. 1. Exceptions filed.
Dec. 16. Appeal bond filed.
Dec. 16. Objections to plaintiff's bill of costs filed.
Dec. 16. Notice of taxation of additional attorney fee filed.
Dec. 19. Order taxing costs filed, $90.50.

1917.
Jan. 13. Notice and motion for new trial filed.
Jan. 23. Stipulation filed.

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Jan. 24. Notice, motion, etc., filed.
Jan. 29. Time to settle bill of exceptions extended to March 1, 1917.
Feb. 27. Notice, motion and affidavit filed.
Feb. 27. Reasons for overruling motion for new trial filed.
March 1. Exceptions to denial of new trial filed.
March 5. Time to settle bill of exceptions extended to 40 days from March 1, filed.

1 STATE OF MICHIGAN:

Supreme Court.

Declaration.

(Filed April 3, 1915.)

In the Circuit Court for the County of Bay.

STATE OF MICHIGAN,
County of Bay, ss:

The Fletcher Paper Company, a corporation organized and existing under the laws of the State of Michigan, with its principal offices at Alpena, Michigan, plaintiff herein by Gillett & Clark, its attorneys, complains of the Detroit & Mackinac Railway Company, an intra state railroad corporation, organized and doing business within and under the laws of the state of Michigan, defendant herein, in a plea of trespass on the case upon promises, filing this declaration as commencement of suit.

For that whereas, plaintiff at the time of the grievances hereinafter mentioned, was engaged in the business of manufacturing paper and other wood products at Alpena, Michigan, and for that purpose was engaged in transporting logs and other forest products over the line of the defendant's railroad, subject to the regulations

and tariffs imposed by the defendant upon the traffic aforesaid.

2 And, whereas, plaintiff, considering itself aggrieved by the unfair, excessive, unreasonable and discriminatory rates imposed by defendant upon the shipment and carriage of forest products for the purposes aforesaid, heretofore, to-wit, on the 23d day of February, 1909, and on March 11, 1909, and on April 24, 1909, filed its three several complaints with the Railroad Commission of the state of Michigan, such complaints being filed under and by virtue of Section 22 and the other pertinent sections and provisions of Act No. 300 of the Public Acts of Michigan of the year 1909, with the amendments thereto.

And whereas, in pursuance of the proceedings so instituted before the Railroad Commission, said Commission heretofore, to-wit, on the 19th day of October, 1909, and on the 22d day of October, 1909, and on the 3d day of November, 1909, promulgated and gave effect to three certain orders and findings in words and figures respectively as follows, to-wit:

STATE OF MICHIGAN: ss.

Before the Michigan Railroad Commission.

Session of the Michigan Railroad Commission held at its offices in the city of Lansing, on the 19th day of October, A. D. 1909.

D-189.

FLETCHER PAPER COMPANY, Complainant,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

The above named Fletcher Paper Company having duly filed its complaint with this commission, charging in substance among other matters that the local freight tariff naming switching charge between Alpena, Mich., and Broadwell's Dam (sometimes

3 called Fletcher's dam) M. R. C. 217, is unreasonable and unjustly discriminatory, and after due notice to all parties concerned, and a hearing having been had thereon and after duly considering the evidence and arguments of counsel, and it appearing to the commission that the rate named in the local freight tariff M. R. C. 217, to-wit, $5.00 per car in each direction on all commodities between the city of Alpena and said Broadwell's Dam, is unreasonable and unjustly discriminatory, and it appearing to the commission that $3.50 a car in each direction between said city of Alpena and Broadwell's Dam on all commodities is reasonable and just;

Now, therefore, by virtue of the authority vested in us by law, it is ordered that said defendant, the Detroit & Mackinac Railway Company, within twenty days from the date of service of a certified

copy of this order on it, file, publish and put in force a rate for switching charge between Alpena, Mich., and Broadwell's dam, not to exceed $3.50 per car in each direction on all commodities;

Ordered further, that M. C. R. 217, heretofore filed and published by said defendant, be canceled and that said Detroit & Mackinac Railway Company cease and desist after said twenty days from charging more than $3.50 per car in each direction between Alpena, Mich., and Broadwell's Dam, for any commodity.

CASSIUS L. GLASGOW,
GEORGE W. DICKINSON,
JAMES SCULLY,
Commissioners.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

At a session of the Michigan Railroad Commission, held at its offices in the city of Lansing, on the 22d day of October, A. D. 1909.

4 D-188.

F. W. GILCHRIST, CHURCHILL LUMBER COMPANY, ISLAND MILL LUMBER COMPANY, Complainants,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendants.

Complaint having been made by the above named complainants charging that the above named defendant by its public tariff now in effect for the transportation of logs to the city of Alpena, state of Michigan, is charging rates that are unjust, and discriminatory, and issue having been joined thereon by the said parties and a hearing having been had wherein the parties were present and represented by counsel and the evidence and arguments of counsel having been duly considered by the commission, the commission doth find that the matters alleged in the complaint are substantially true and that the rates charged for the transportation of logs in carload lots to said city of Alpena are unjust, unreasonable and excessive, and that said rates should be reduced as hereinafter set forth;

Now, therefore, by virtue of the authority vested in us by law, it is hereby ordered that the Detroit & Mackinac Railway Company do publish, file and put into operation so as to become effective twenty (20) days from the date of the service of this order on defendant, a tariff for the transportation of logs in carload lots to the said city of Alpena, as follows:

Ten (10) miles or less not to exceed one dollar ($1.00) per thousand (1,000) feet;

Over ten (10) miles and not exceeding twenty (20) miles, not

to exceed one dollar and thirty-three cents ($1.33) per thousand (1,000) feet;

Over twenty (20) miles and not exceeding thirty (30) miles, not to exceed one dollar and sixty-seven cents ($1.67) per thousand (1,000) feet;

5 Over thirty (30) and not exceeding fifty (50) miles, not to exceed two dollars ($2.00) per thousand (1,000) feet;

Over fifty (50) and not exceeding (80) miles, not to exceed two dollars and thirty-three cents ($2.33) per thousand (1,000) feet;

Above rates to apply when the manufactured product is reshipped via defendant company's line, and when not so to be reshipped, that defendant company are authorized to collect in addition to said rate fifty cents (50c) per thousand (1,000) feet, but if later reshipment is made over defendant company's line, they are to refund to each shipper the fifty cents (50c) per thousand (1,000) feet collected, and,

It is further ordered, that the books of both defendant company and complainants (and all other shippers of logs affected by this order), shall show plainly the total of inbound shipments and the reshipment of the manufactured product; and,

It is further ordered, that these rates apply to all classes of logs transported by said defendant to said city of Alpena, within the distance above set forth.

GEORGE W. DICKINSON,
JAMES SCULLY,
Commissioners.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

At a session of the Michigan Railroad Commission, held at its offices in the city of Lansing, on the 3d day of November, A. D. 1909.

D-188.

F. W. GILCHRIST, CHURCHILL LUMBER COMPANY, ISLAND MILL LUMBER COMPANY, Complainants,

vs.

DETROIT & MACKINAC RAILROAD COMPANY, Defendant.

6 *Supplemental Order.*

An order having been heretofore made in the above entitled cause, on to-wit, the 19th day of October, A. D. 1909, prescribing the rate of carload shipments of logs to the city of Alpena originating on the defendant company's line, and it appearing to the Commission that the minimum to be applied in the application of the rates set forth in said order of October 19th, should be the same as

set forth in defendant company's tariff, on the file with the Commission, and described as M. R. C. No. 208, G. F. D. No. 560 (corrected), and

It further appearing that the rate applying to Fletcher's Dam (formerly Broadwell's Dam), situated on defendant company's line, should be the same as the rate to Alpena.

Now, therefore, by virtue of the authority vested in us by law, it is hereby ordered, that the said defendant company may charge a minimum rate per car on carload shipments covered by this order the same as now appears in defendant company's tariff, described as M. R. C. No. 208, G. F. D. No. 560 (corrected), now on file with this Commission, to-wit:

Not to exceed ten (10) miles, three dollars ($3.00) per car;
Not to exceed twenty (20) miles, four dollars ($4.00) per car;
Not to exceed thirty (30) miles, five dollars ($5.00) per car;
Not to exceed fifty (50) miles, six dollars ($6.00) per car;
Not to exceed eighty (80) miles, seven dollars ($7.00) per car;
Not to exceed one hundred (100) miles, eight dollars ($8.00) per car.
Not to exceed one hundred and twenty-five (125) miles, nine dollars ($9.00) per car.
Not to exceed one hundred and fifty (150) miles, ten dollars ($10.00) per car.

7 And it is further ordered, that on all carload shipments of logs or pulp wood originating at points on defendant company's line of railroad north of Fletcher's Junction the rate to Fletcher's Dam (formerly Broadwell's Dam), shall be the same as the rate to Alpena, and that on all carload shipments of logs or pulp wood originating at points on defendant company's line of railroad south of Alpena the rate to Fletcher's Dam (formerly Broadwell's Dam) shall be the same as the rate to Alpena.

This order may be rescinded, altered or amended at any time when, in the judgment of the Commission such action should be taken.

CASSIUS W. GLASGOW,
Chairman;
GEORGE W. DICKINSON,
JAMES SCULLY,
Commissioners.

And, whereas, the defendant being dissatisfied with the orders of the Commission aforesaid, heretofore, to wit, on the 20th day of November, 1909, filed its bill of complaint in the circuit court for the county of Wayne, in chancery, to set aside the orders of the Commission aforesaid, and thereafter to-wit, on the 11th day of February, 1911, a decree was made and entered in and by the said circuit court for the county of Wayne, in chancery, dismissing the said bill of complaint, all of which will more fully appear by the terms of said decree and by the files and records in the said action, to which reference is hereby made.

And, whereas, defendant thereafter appealed from the decree of the circuit court for the county of Wayne in chancery, aforesaid, to the supreme court of the state of Michigan, and after due hearing a

decree was entered by the supreme court aforesaid, affirming
8 the said decree of the circuit court, for the county of Wayne, in chancery, all of which will more fully appear by the records, files and decree aforesaid, to which reference is hereby made.

And whereas, thereafter to-wit, on or about the 17th day of August, 1912, the defendant filed a bill of complaint in the district court of the United States for the eastern district of Michigan, southern division, sitting in equity by which bill of complaint it was sought to set aside and nullify the findings and orders of the Commission aforesaid and the decree aforesaid, as in violation of the proceedings of the Constitution of the United States.

And Whereas upon the denial of an injunction in such action an appeal was taken to the supreme court of the United States, and the order of the district court affirmed; and thereafter, on to-wit, the twenty-eighth day of December, 1914, a decree was entered in the district court aforesaid, dismissing the said bill of complaint, all of which will more fully appear by the orders and decrees aforesaid, and the files and records in said action, to all of which reference is hereby made.

And whereas, thereafter, to-wit, on the 25th day of July, 1914, upon an application made by the plaintiff and others to the supreme court of the state of Michigan, a mandatory order was issued commanding the defendant herein to forthwith put into full force and effect the three several orders of the Railroad Commission aforesaid, all of which will more fully appear by the order aforesaid, and by the records and files in said action, to which reference is hereby made, by reason whereof the defendant heretofore, to-wit, on the 18th day of February, 1915, issued and put into force a certain freight tariff in the words and figures following, to-wit:

9 No supplement to this tariff will be issued except for the purpose of cancelling the tariff.

M. R. C. No. 451. Cancels M. R. C. No. 450. Re-issue—Reduction.

Mackinac Route, Detroit & Mackinac Railway Co.

G. F. D. No. 775-A. Cancels G. F. D. No. 775.

Local Freight Tariff on Logs.

Shipped in carload lots from stations on the Detroit & Mackinac Railway to Alpena, Mich., and Fletcher's Dam, Michigan.

Governed except as otherwise provided herein, by Official Classification No. 42, I. C. C. O. C. No. 42, M. R. C. O. C. No. 42, issued by R. N. Collyer, Agent, (D. & M. Ry. G. F. D. No. 702 F) supplements thereto and reissues thereof and by Exceptions to said classifications, I. C. C. No. 406, M. R. C. No. 79, issued by E. Morris, Agent, (D. & M. Ry. G. F. D. No. 675 F) supplements thereto and reissues thereof.

Issued February 18, 1915. Effective February 19, 1915.
This tariff is filed and published in obedience to the orders of the Supreme Court of Michigan, and order of Michigan Railroad Commission, D. 188, dated October 19, 1909, also supplemental order D. 188 dated November 3, 1909.
Issued by

W. G. MacEDWARD,
General Freight Agent, Bay City, Mich.

(300.)

Rates on Logs (Carloads) from Stations on D. & M. Ry. to Alpena and Fletcher's Dam, Mich.

Ten (10) miles or less, not to exceed one dollar ($1.00) per 1,000 feet.
Over ten (10) miles and not exceeding twenty (20) miles not to exceed one dollar and thirty-three cents ($1.33) per thousand feet.
Over twenty (20) miles and not exceeding thirty (30) miles, not to exceed one dollar and sixty-seven cents ($1.67) per thousand feet.
Over thirty (30) miles and not exceeding fifty (50) miles not to exceed two dollars ($2.00) per thousand (1,000) feet.
Over fifty (50) miles and not exceeding eighty (80) miles, not to exceed two dollars and thirty-three cents ($2.33) per thousand (1,000) feet.
Above rates to apply when the manufactured product is reshipped via the Detroit & Mackinac Railway Company, and when not to be so reshipped, the railway company will collect in addition to the above rates fifty (50c) cents per thousand feet, but if later reshipment is made over the Detroit & Mackinac Railway, the company will refund to such shipper the fifty (50c) — per thousand feet collected.

NOTE.—It is the order of the Michigan Railroad Commission that the books of the Detroit & Mackinac Railway Co. and the shippers of logs operating under this tariff shall show plainly the total of inbound shipments and the reshipment of the manufactured product.
To enable the Detroit & Mackinac Ry. Co. to check outbound shipments of lumber against inbound shipments of logs shippers operating under the tariff will show on bills of lading the number of feet of lumber on each car so shipped.
The above apply to all classes of logs transported by the Detroit & Mackinac Railway to the City of Alpena, Mich., and Fletcher's Dam, Mich., within the distances above set forth.

Minimum Rates Per Car.

Not to exceed	10 miles	$3.00 per car;
Not to exceed	20 miles	4.00 per car;
Not to exceed	30 miles	5.00 per car;
Not to exceed	50 miles	6.00 per car;
Not to exceed	80 miles	7.00 per car;
	Not to exceed 100 miles	8.00 per car;
	Not to exceed 125 miles	9.00 per car;
	Not to Exceed 150 miles	10.00 per car.

This tariff is governed by D. & M. Ry. G. F. D. No. 565-E, M. R. C. No. 377, as to facilities, prepayment of freight charges and mileage between stations on the Detroit & Mackinac Ry.

And Whereas, during all the time which elapsed between the findings and orders of the Railroad Commission aforesaid, and the making of the new tariff last aforesaid, defendant required and compelled plaintiff to pay for the carriage of its forest products, freight rates which were excessive, unreasonable, unjust and discriminatory, and in excess of the lawful rates as fixed and established by the findings, orders and decrees aforesaid, and Whereas, during all of the time aforesaid, plaintiff paid such excessive rates under compulsion, for the purpose of reducing plaintiff's damages, and as the only means by which it could obtain the shipment of forest products which were essential to the operation of plaintiff's mill.

And plaintiff says that by reason of the premises, defendant heretofore to-wit, on the 19th day of October, 1909, became and was charged with an obligation imposed by law to accept, haul, and deliver for plaintiff all forest products shipped or tendered for shipment, at the rates fixed by the orders of the commission aforesaid and to return and repay to the plaintiff on demand all sums received in excess of the rates so fixed.

And the plaintiff says that by reason of the premises, defendant heretofore, to-wit, on the 20th day of March, 1915, at Bay City, in said county of Bay became and was indebted to the plaintiff in a large sum to-wit, in the sum of Twenty Thousand Dollars ($20,-
12 000) being the excessive amount paid to and exacted and retained by defendant for the shipment and carriage of a large quantity, to-wit, 22,188,000 feet of hemlock saw-logs at rates fraudulently and arbitrarily fixed by said defendant and in excess of the legal rates for the transportation of such logs.

Also in a large sum, to-wit, the sum of Six Thousand Six Hundred and Four Dollars ($6,604.00) being the excessive amount paid to and exacted and retained by defendant for the switching and transfer of a large number, to-wit, 2,987 cars of forest products and other freight between Alpena, Michigan, and Fletcher's Dam, Michigan, at the rate of $5.00 per car being $1.50 per car in excess of the legal rate.

And thereupon the defendant afterwards and on the day and year aforesaid, in consideration of the premises, then and there promised the plaintiff to pay it the said several sums of money respectively, on request, yet the said defendant has disregarded its said promises and has not (although often requested to do so) paid any of the said sums of money, or any part thereof, to plaintiff's damage of Thirty Thousand Dollars ($30,000) and therefore it brings suit.

And for that whereas, at the time of the grievances hereinafter mentioned and referred to, the situation, condition and relations of the parties hereto were as alleged and described in the first count hereof, which allegations and descriptions are hereby referred to and made a part of this count.

And Whereas, by the terms of the orders of the Railroad Commission aforesaid, the payment and collection of a portion of the freight rates established by the said orders, to-wit, the sum of fifty cents per

thousand on logs of all kinds and classes, was made condi-
13 tional upon the failure of the shipper to re-ship by rail the product manufactured from the forest products originally so shipped.

And whereas, from and after the date of the last order of the Commission aforesaid, to-wit, the 3rd day of November 1909 and from thence hitherto, plaintiff as a condition of the shipment of its forest products has been compelled by defendant unlawfully and in violation of the terms of the orders aforesaid, to pay the excess sum of fifty cents per thousand feet upon all forest products shipped to the plaintiff at Alpena, Michigan, including those of which the manufactured product was intended to be and was reshipped over the defendant's railroad, the sums so paid being unlawfully exacted and retained by the defendant.

And plaintiff says that heretofore, to-wit, on the 20th day of March, 1915, at Bay City, in said county, defendant became and was indebted to the plaintiff in a large sum, to-wit, the sum of Twelve Thousand Dollars ($12,000) being the excessive amount paid by plaintiff to and unlawfully exacted and retained by defendant, at the rate of fifty cents per thousand feet in a large quantity, to-wit, 23 million feet of logs shipped to the plaintiff at Alpena, Michigan, the manufactured product of which had been theretofore re-shipped by plaintiff over the line of the defendant's railroad.

And thereupon the defendant afterwards and on the day and year aforesaid, in consideration of the premises respectively then and there promised to plaintiff to pay it, the sum of money on request, yet the said defendant has disregarded its said promises and has not (although often requested to do so) paid the sum of money, or any part thereof, to plaintiff's damage of $40,000, and therefore it brings suit.

14 And also for that whereas, the defendant heretofore to-wit, on the 20th day of March, 1915, at Bay City, in said county of Bay, was indebted to the plaintiff in the sum of thirty thousand dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendant, at its request.

And in like sum for the price and value of work then and there done and materials for the same provided by the plaintiff for the defendant at its request.

And in like sum for money then and there lent by the plaintiff to the defendant, at its request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant, at its request.

And in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them.

And thereupon, the said defendant afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay it the said several sums of money respectively, on request; yet the said defendant has disregarded its said promises, and has not (although often requested so to do) paid

any of the sums of money, or any part thereof; to plaintiff's damage of Forty Thousand Dollars ($40,000), and therefore it brings suit, etc.

GILLETT & CLARK,
Plaintiff's Attorneys.

Business Address, Shearer Building, Bay City, Mich.

15 *Rule to Plead.*

On filing the within declaration in this cause pursuant to the statute authorizing the commencement of suits by declaration, and on motion of Gillett & Clark, attorneys for plaintiff, it is ordered that defendant in said cause appear and plead to said declaration within fifteen days after service upon it of a copy thereof, and of notice of this rule, or judgment, etc.

GILLETT & CLARK,
Attorneys for Plaintiff.

Plaintiff's Bill of Particulars.

(Filed April 26, 1915.)

In the Circuit Court for the County of Bay.

STATE OF MICHIGAN:

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

To Mr. James McNamara, Attorney for Defendant:

Please take notice that the following constitutes the bill of particulars of the claims of plaintiff for the recovery of which this suit was brought, viz:

Excess switching charge paid to defendant by plaintiff for switching or moving cars between Alpena and Fletcher's Dam, sometimes called Broadwell, in excess of $3.50 per car, the rate fixed as reasonable in the order of the Commission dated October 19, 1909:

In 1909, cars switched 591; overcharge	$1,370.00
In 1910, cars switched 462; overcharge	808.50
In 1911, cars switched 313; overcharge	469.50
16 In 1912, cars switched 679; overcharge	1,557.50
In 1913, cars switched 559; overcharge	1,328.50
In 1914, cars switched 383; overcharge	1,070.50
	$6,604.50

and interest at 5 per cent per annum, from the time such overcharges were severally made.

Excess freight charges paid to defendant by plaintiff for transportation of logs in carload lots consigned to plaintiff at Alpena, Michigan, in excess of rates fixed as reasonable in the orders of the Commission dated October 22, 1909, and November 3, 1909, respectively, viz:

In 1909, logs received	4,148,235;	overcharge.....	$4,099.90
In 1910, logs received	2,990,363;	overcharge.....	2,770.53
In 1911, logs received	2,638,980;	overcharge.....	2,087.15
In 1912,			
In 1913, logs received	5,609,060;	overcharge.....	4,423.91
In 1914, logs received	6,801,040;	overcharge.....	5,690.56
	22,187,678		119,072.05

and interest is claimed by plaintiff at 5 per cent per annum from the time said overcharges were severally paid. Dated, Bay City, Mich., April 26, 1915.

GILLETT & CLARK,
Attorneys for Plaintiff.

Business Address, Bay City, Mich.

Motion to Dismiss for Want of Jurisdiction.

(Filed May 4th, 1915.)

The defendant, the Detroit & Mackinac Railway Company, by James McNamara and Henry and Henry, its attorneys,
17 moves the court to dismiss this case for want of jurisdiction on the following grounds:

1. It appears by the declaration in this cause that the corporation plaintiff is located and has its principal office in the city of Alpena, in Alpena county, Michigan, and that the Detroit & Mackinac Railway Company has its principal office in the same city and county.

2. It appears by the plaintiff's declaration that the plaintiff is not located in or a resident of the county of Bay, and that the defendant is not located in or a resident of the county of Bay.

3. Service of process upon an officer of the defendant in the county of Bay is not sufficient to confer jurisdiction.

4. To sustain jurisdiction in this case would be contrary to the ruling of the supreme court of the state in Haywood vs. Johnson, 41 Mich. 598, and other decisions of this court.

This motion is based upon the plaintiff's declaration and the service of process thereof.

JAMES McNAMARA,
HENRY & HENRY,
Attorneys for Defendant.

Demand for More Specific Bill of Particulars.

On receiving the plaintiff's bill of particulars the same being regarded by defendant as not sufficiently specific, a demand was made, filed, and served that plaintiff by its attorneys, make, file and serve on the defendant's attorneys, a more detailed and specific statement of the dates, items and amounts claimed by the plaintiff for the recovery of which this action was brought. There-
18 upon plaintiff's attorneys furnished a bill of particulars which thereafter by agreement between all the counsel in this case was checked over, verified and the substance thereof set forth in connection with a stipulation, which stipulation and agreed bill of particulars is hereinafter set forth.

Demurrer.

(Filed May 12, 1915.)

The defendant, the Detroit & Mackinac Railway Company, by James McNamara, its attorney, says that the special counts of the plaintiff's declaration are not sufficient in law and the special reasons in matters of substance and form, and the grounds of this demurrer are as follows:

I.

The common law remedies for irregular, exorbitant, unreasonable or excessive charges or exactions by common carriers for the transportation of freight between points in Michigan have been abrogated and abolished by subdivision (*g*) of Section 10, of Acts No. 300, Public Acts 1909, pp. 704, 715, as re-enacted by Act No. 139, Public Acts 1911, pp. 205, 209, the same being the acts of the legislature of this state, defining and regulating common carriers and creating the Michigan Railroad Commission.

II.

The plaintiff seeks reparation without having made any complaint to the Michigan Railroad Commission under said subdivision (*g*); and the special counts of its declaration do not know that complaint has been made to the commission, or that the commission has made any findings or orders on complaints made under said subdivision.

19 III.

It appears by the special counts of the plaintiff's declaration that the orders therein set forth of October 22nd, 1909, and November 3rd, 1909, were not put in force by filing a schedule or tariff until February 18th, 1915, and that the plaintiff's cause of action is for alleged excessive charges before that date.

IV.

It does not appear by the plaintiff's declaration that the order therein set forth of October 19th, 1909, was ever put in force by the filing of a tariff or otherwise.

V.

No cause of action is set forth in the special counts of the plaintiff's declaration.

VI.

The plaintiff's bill of particulars shows that it has no cause of action under the common counts of the declaration, other than the alleged causes of action in the special counts.

Wherefore the defendant prays that this its demurrer may be sustained and the plaintiff's action dismissed with costs and the defendant prays judgment accordingly.

JAMES McNAMARA,
Attorney for Defendant.

2025-31 Dime Bank Bldg., Detroit, Mich.

Certificate of Counsel.

This is to certify that I, James McNamara, the counsel having principal charge of the cause in behalf of the Detroit & Mackinac Railway Company, the party filing the above foregoing demurrer, do certify that the demurrer is not interposed for delay, and that in my opinion it is well founded.

JAMES McNAMARA,
Attorney for Defendant.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Amendment of Plaintiff's Declaration.

(Filed May 18, 1915.)

Plaintiff hereby amends its declaration filed herein, by making the following additions, viz:

On page ten of said declaration, at the end of the first count thereof, the following is inserted, viz:

"By reason whereof and of the provisions of Section 19 of Act No. 300 of the Public Acts of 1909, defendant became liable to plaintiff in double the amount of damages so sustained, to plaintiff's damage of sixty thousand ($60,000.00) dollars, and therefore it brings suit."

On page twelve of said declaration, at the end of the second count thereof, the following is inserted, viz:

"By reason whereof and of the provisions of Section 19 of Act No. 300 of the Public Acts of 1909, defendant became liable to plaintiff in double the amount of damages so sustained, to plaintiff's damage of eighty thousand ($80,000.00) dollars, and therefore it brings suit."

Also on page thirteen of said declaration, at the end of the common counts, the following is inserted, viz:

"By reason whereof and of the provisions of Section 19
21 of Act No. 300 of the Public Acts of 1909, defendant became liable to plaintiff in double the amount of damages so sustained, to plaintiff's damage of eighty thousand ($80,000.00) and therefore it brings suit."

Also a new count is added at the end of the said declaration as follows, to-wit:

"Also for that whereas, the defendant heretofore, to-wit, on March 20, 1915, at Bay City, in said county of Bay, was indebted to plaintiff in the sum of forty thousand ($40,000.00) dollars for damages sustained by plaintiff in consequence of defendant's omission to do certain acts required to be done by it, by the lawful orders of the Michigan Railroad Commission made under the provisions of Act 300 of the Public Acts of Michigan for the year 1909, and in consequence of the violation by defendant of lawful orders made by the Michigan Railroad Commission under the provisions of the said act, the nature of such omissions and violations being more particularly described, recited and alleged in the preceding counts of this declaration, all of which descri, ions, recitals, and allegations are hereby referred to and made a part of this count, with the same force and effect as if repeated herein.

And whereas, by virtue of the provisions of Section 19 of Act No. 300 of the Public Acts of Michigan of the year 1909, the defendant then and there became liable to the plaintiff in double the amount of damages sustained in consequence of such violation, to-wit, the sum of eighty thousand ($80,000.00) dollars.

And thereupon, the said defendant afterwards and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay it, the said sum of money, on request, yet the said defendant has disregarded
22 its said promises and has not (although often requested to do so), paid the sum of money or any part thereof, to plaintiff's damage of eighty thousand ($80,000.00) dollars, and therefore it brings suit etc."

GILLETT & CLARK,
Plaintiff's Attorneys.

Business Address, Shearer Building, Bay City, Mich.

To James McNamara, Attorney for Defendant.

SIR: Take notice that the above is a true copy of the amendments to plaintiff's declaration herein this day filed by virtue of the provisions of Circuit Court Rule 10.

Yours, etc.,

GILLETT & CLARK,
Attorneys for Plaintiff.

Dated May 18, 1915.

Order Denying Motion to Dismiss.

(Filed May 20, 1915.)

The motion of said defendant to dismiss the cause for want of jurisdiction having come on to be heard, and after due deliberation it is ordered that the same be and is hereby denied.

STATE OF MICHIGAN:

In the Circuit Court of the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

23 *Exception.*

Now comes the defendant and excepts to the order of the court denying its motion to dismiss.

JAMES McNAMARA,
HENRY & HENRY,
Attorneys for Defendant.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Motion for Change of Venue.

Now comes the said defendant by James McNamara, its attorney, and moves the court to change the venue of this case by transferring the cause for trial to the circuit court of the county of Alpena and for the following reasons:

1. The alleged cause of action of the plaintiff arose in the county of Alpena.
2. All the principal witnesses of each of the parties to this cause reside in the county of Alpena.
3. This cause should have been commenced in the county of Alpena.

This motion is based on the plaintiff's declaration and on the files and records in the case and on the affidavit of James McNamara, herewith filed.

Dated Detroit, Mich., May 25th, 1915.

JAMES McNAMARA,
Attorney for Defendant.
FRED A. BAKER,
Of Counsel.

24 To Gillett & Clark, Attorneys for the Plaintiff:

You will please take notice that a motion of which the within and foregoing is a true copy was filed and entered in the within entitled cause on this the 25th day of May, 1915, and you are also herewith served with a copy of the affidavit of James McNamara therein mentioned.

You will also take notice that said motion will be brought on for argument on the 5th day of June, 1915, at the opening of court on that day or as soon thereafter as counsel can be heard.

Dated May 25th, 1915.

JAMES McNAMARA,
Attorney for Defendant.
FRED A. BAKER,
Of Counsel.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

COUNTY OF WAYNE, *ss:*

James McNamara, being duly sworn, deposes and says that he is the attorney for the defendant in the above entitled cause; that he is familiar with the facts which form the basis of the plaintiff's alleged cause of action; that the cause of action arose in the county of Alpena and the principal witnesses of both of the parties reside in the county of Alpena; that the plaintiff and the defendant are

both located and a resident in the city of Alpena in the
25 county of Alpena and a trial of any issue of fact in the cause can be more conveniently tried in the county of Alpena than in a*yn* other county in this state.

JAMES McNAMARA.

Subscribed and sworn to before me, a notary public, on this the 25th day of May, A. D. 1915.

IRMA GREIMER,
Notary Public, Wayne County, Mich.

My commission expires March 15, 1916.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Opinion of Circuit Judge Overruling Demurrer.

(Filed June 30, 1915.)

In this action the plaintiff has filed a declaration alleging that its place of business is Alpena, and that it ships freight from points on the line of defendant's road to Alpena; that in November, 1909, on its application, orders were made by the Michigan Railroad Commission, fixing the rate on freights from certain points to Alpena, pursuant to the provisions and powers given to the Commission by Act No. 300 of the Public Acts of 1909 as amended.

That pursuant to the provisions of said statute the question of the reasonableness and legality of these orders was presented to the supreme court of Michigan, which by its decree decided that the orders were rightfully made and of legal effect and force,
26 following which the question was presented to the supreme court of the United States, which court affirmed the action of the supreme court of Michigan, following which in proceedings for contempt the supreme court of Michigan further confirmed its first decision.

It is the claim of plaintiff that while these orders were in force and under litigation as above described, it shipped freight from the points above referred to to Alpena, and paid thereon the rates exacted by the defendant, which rates were in excess of the rates fixed by said orders, and to collect the amount of this excess, that is, the difference between the amount exacted and paid and the amount fixed by said orders, the plaintiff has brought this action of assumpsit, claiming that this excess was money in the hands of the defendant belonging to it.

The declaration also shows that in February, 1915, the defendant filed and published a tariff in obedience and compliance with the decree of the supreme court of Michigan and said Railroad Commission orders.

To this declaration the defendant has filed a demurrer setting forth the following grounds:

(*a*) That the plaintiff is not entitled to maintain this action for money paid as excessive charges, because the common law remedy of the plaintiff invoked by said declaration has been abrogated and abolished by subdivision (*g*) of section 10 of said act.

(*b*) That compliance with the provisions of said subdivision (*g*) of said section has not been had, in that no complaint was made to the commissoin under said subdivision by plaintiff before the commencement of this suit, and that such action under said subdivision is a requisite condition precedent to the maintenance of such suit.

(*c*) That it is a necessary condition requisite to the com-
27 -encement of this suit that a tariff should be filed by the defendant to comply with the orders aforesaid; and that such tariff was not filed until February 18, 1915, and that this tariff not being so filed no recovery could be had on account of excess freights prior to that date.

The disposition of these questions requires a thorough consideration of said chapter 300 as amended and the object and purpose of said statute and certain specific provisions thereof.

It plainly appears that this statute introduces new elements, circumstances and conditions in relations between railroad companies and their shipper patrons, and that it gives to the patrons under certain conditions rights and remedies not given by the common law.

It is fundamental and elementary that where a statute gives rights or remedies not theretofore given by the common law such rights and remedies are to be considered as cumulative and not as abrogating the common law rights and remedies, unless the statute giving those remedies either by express terms or by clear inference abrogates *such* common law rights and remedies. And the question under consideration is whether or not the statute in question either expressly or by fair inference abrogates such common law rights.

Upon this question as to whether or not the act directly or by inference takes away a right or remedy before that enjoined by a shipper, the general intention and purpose of the act is a controlling feature, because I believe it to be a settled principle of statutory construction, in this state that where an act or series of acts show a prim*ary* object to be carried out, the general intention of the legislature as shown by the act or acts will be carried out regardless of circumstances. That correct rules of grammatical construction,
28 standard rules of definition of words, and recognized general rules of statutory construction might singly or together lead to a different conclusion.

Ploff vs. Bangor Township, 168 Mich. 697.

Drake vs. Industrial Works, 174 Mich. 622.

Hartingh vs. Bay Circuit Judge, 176 Mich. 296.

From an examination of this statute I fail to find any purpose of the legislature to take away from any shipper any right theretofore enjoyed by him. From such examination I find a well-defined purpose to give a shipper under certain conditions rights and remedies not theretofore enjoyed by him. Any one of the rights given by the statute is the right to have the commission fix a legal rate on a given commodity between indicated points as between a railroad company and a shipper. The fixing of such rate is by an order of the commission and is prima facie lawful and reasonable until found otherwise, pursuant to a provisions of section 26, or modified under section 24. This rate when settled by a court decision under the provisions of section 26 becomes an adjudication and final, so that in a controversy thereafter between a shipper and the company upon the point of the reasonableness or unreasonableness of the rate, the order so settled by the court is an adjudication, and one of the main objects of the bill is to produce this result. The effect of this is to make an adjudication upon a commodity rate between points for the future until the rate is modified pursuant to law, and in this way one adjudication would take the place of many controversies and tend to prevent many law suits.

But there is nothing in the giving of this right and rem-
29 edy which in and of itself takes from a shipper a remedy theretofore enjoyed by him. In point of actuality it favors the common law remedy by suit, in that it substitutes the order of the commission approved by the court for the verdict of the jury on the adjudicated rate.

From a consideration of the whole act it is my opinion that upon point under consideration the common law remedy of the shipper to sue for the excessive charges paid and recover the same in an action of assumpsit is not taken away.

Sections 40, 46 and 47 are referred to by counsel, it being claimed on the one hand that these sections show that said common law remedy is preserved, and upon the other hand that they do not have this effect. It may be that these provisions do not have the specific effect of reserving said common law right to sue for excessive rate freight payments, but they certainly do not contain either separately or collectively any provision which opposes or tends to abrogate such right, and it appears to me that considering the effect of these three sections separately or together they tend to show the legislative intention to preserve the common law right described.

Referring specifically to the claim that paragraph *g*, section 10, abrogates a common law remedy of the shipper, attention is called to the following elements of the act. Sections 22, 23, 24, 25, 26 and 27 provide machinery for making what might be termed a working program for future services as between a railroad company and a shipper; they providing for a full hearing and a fixing of the future rates for commodities between given points; they provide a specific method for the review of that order and its confirmation, modification, or disaffirmance by a court. There is no provision made therein for the fixing of a rate for past excessive charges.

30 On the other hand section 10 requires a railroad company to make and file and publish a tariff of rates which shall be in force for a certain time after publication. The rate fixed by this tariff is presumed to be reasonable until it is otherwise made to appear.

As a part of the machinery of Se. 10 it is provided by Sec. 10 (*g*) that notwithstanding the fixing of the rate by the Co. and notwithstanding such rate is presumed reasonable and fair, notwithstanding the freight so fixed has been paid, that even within six months after the delivery of any shipment of freight at destination any shipper may attack the reasonableness of the rate he has before that recognized, before the commission. This attack is made through a hearing and determination of the commission as to whether the rate before that exacted was irregular or exorbitant, and as to what would have been a reasonable rate, and provides that if the reasonable rate is found to be less than the exacted rate the railroad company should be required to refund, and permits a shipper in that case to sue for the excessive exacted amount before that paid by him, and in such suit the order of the railroad company is treated as prima facie correct, but no railroad company sued under such conditions shall be liable for any penalty or forfeiture, or subject to any prosecution under the laws of this state on account of making such refund.

Paragraph *g* refers to section 22 for a part of the procedure to be used in fixing the rate that shall be reasonable and lawful, but in my opinion paragraph *g* was intended to provide for cases and conditions which it was assumed, and in fact were not, provided for by section 22, and gives a remedy different from that provided by section 22, and neither modifies or in any way affects the provisions of section 22 or the proceedings thereunder, or takes away any
31 common law right of any shipper.

I am of the opinion that the filing of a tariff by defendant was not a condition precedent to a suit for excess freight by the plaintiff, and that the failure of the defendant to sooner file a tariff and comply with the order of the Railroad Commission has no effect whatever on plaintiff's right or remedy under the statute.

I have carefully considered the point made against plaintiff's claim based on the Interstate Commerce Act and the decisions of the supreme court of the United States construing the same.

Without going into detail as to the reasons therefor I am of the opinion that the conditions and circumstances and general purpose of the two acts so far as this particular question is concerned, are so manifestly different that the United States supreme court decisions are not applicable to our statute.

For the foregoing reasons the demurrer is overruled.

C. L. COLLINS,
Circuit Judge.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Reasons for Denying Motion for Change of Venue.

(Filed June 30, 1915.)

This case was brought to issue by the filing of a demurrer. A motion for a change of venue has been made in the case, but this motion was not filed until or more than ten days had intervened between the case coming to issue and the filing of the
32 motion for a change of venue.

Circuit Court Rule 58 provides that motions for change of venue in any civil cause shall be entered and notice of hearing served within ten days after the cause shall be at issue.

I am bound to follow this rule and in doing so deny the motion for a change of venue.

C. L. COLLINS,
Circuit Judge.

Order Denying Change of Venue.

(Filed July 7, 1915.)

A motion having been heretofore made on the part of the defendant in this cause that a change of venue be granted by transferring said cause for trial to the circuit court for the county of Alpena, after hearing counsel for the respective parties it is ordered that said motion be and the same is hereby denied, and that plaintiff is hereby awarded an attorney fee of ten dollars as costs of said motion to be taxed.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Now comes the defendant and excepts to the order of the court denying its motion for change of venue.

JAMES McNAMARA,
HENRY & HENRY,
Attorneys for Defendant.

33 *Order Overruling Demurrer.*

(Entered July 7, 1915.)

This cause having been duly brought on for argument on the demurrer of said defendant to plaintiff's declaration, and all and singular the premises being seen and by the court now fully understood and due deliberation having been thereupon had, and it appearing to the said court that the declaration of said plaintiff, and the matter therein contained was sufficient in law for the said plaintiff to have and maintain its aforesaid action thereof against said defendant, it is ordered that the said demurrer be and the same is hereby overruled with costs to plaintiff to be taxed including an attorney fee of ten dollars, and that defendant have leave to plead to said declaration within ten days from the entry of this order.

C. L. COLLINS,
Circuit Judge.

STATE OF MICHIGAN:

In the Supreme Court.

FLETCHER PAPER COMPANY, Plaintiff and Respondent,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant and Relator.

Application for Writ of Certiorari and Denial Thereof.

(Filed July 12, 1915. Denied July 23, 1915.)

On the 12th day of July, 1915, an application was made to the supreme court of the state of Michigan for a writ of certiorari
34 requiring the circuit court for the county of Bay to return to said supreme court all proceedings had and taken in the cause above entitled, wherein the defendant had demurred to the declaration of the plaintiff and said circuit court had overruled said demurrer, and to show cause why an order should not be made in this court sustaining such demurrer, and for this court to review all proceedings in connection with such demurrer according to the statutes and rules and practice controlling the same.

That such application was filed in this court on the 12th day of July, 1915.

That on the 23rd day of July, 1915, a memorandum was filed in the supreme court denying said petition and application, no opinion being filed in connection therewith. The following certificate from the clerk of said court indicates the disposition made of such application:

Certificate of Clerk of the Supreme Court.

Supreme Court of the State of Michigan.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant and Appellant.

Cal. No. Cir. Ct. 10216.

Cal. No. Sup. Ct. 26896 1-2.

IN THE SUPREME COURT, *ss:*

I, Jay Merzt, clerk of the supreme court, and keeper of its records and seal, hereby certify that in the above entitled cause a petition for a writ of certiorari was filed on the 12th day of July, 1915, and that a memorandum was filed on the 23rd day of July,
35 1915, denying said petition; and further that no opinion was filed in the matter.

In testimony whereof, I have hereunto set my hand and affixed the seal of said supreme court at Lansing ,this 29th day of March, A. D. 1917.

[SEAL.] JAY MERTZ,
Clerk.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Plea and Notice.

(Filed July 23, 1915.)

And now comes the above named defendant by James McNamara, its attorney, and demands a trial of the matters set forth in plaintiff's declaration.

JAMES McNAMARA,
Attorney for Defendant.

2026-31 Dime Bank Bldg., Detroit, Mich.

To said Plaintiff:

You will take notice that at the trial of the above entitled cause the defendant will insist and prove under the general issue above

pleaded that the rates fixed by the said orders of October 19th, October 22nd and November 3rd, 1909, are unreasonable
36 and confiscatory in that said rates are not sufficient to cover the cost of hauling logs in carload lots from logging branches to the city of Alpena and that said rates have been shown by practical experience to seriously impair the net profits and income of the Detroit & Mackinac Railway Company and said rates violate the provisions of the Fourteenth Amendment of the Constitution of the United States, and that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction of the equal protection of the laws.

On the trial of the case the defendant will invoke against the alleged causes of action of the plaintiff the protection of said constitutional provisions.

JAMES McNAMARA,
Attorney for Defendant.

The following amendments were thereafter made to defendant's plea and notice by stipulation of counsel:

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Amended Plea and Notice.

(Filed Sept. 6-8, 1916.)

37 The defendant comes and demands a trial of the matters set forth in the plaintiff's declaration.

Notice.

Special and Affirmative Defenses.

The defendant gives notice that on the trial of this cause, if incumbent upon it in that behalf, it will submit evidence relative to and insist upon the following special and affirmative defenses; and gives further notice that pursuant to Circuit Court Rule No. 23 it hereby indicates the nature of such special and affirmative defenses relied upon, viz:

First.

The rates fixed by the Michigan Railroad Commission's orders of October 19th, October 22nd and November 3rd, 1909, (specified in the plaintiff's declaration), are unreasonable, illegal and confiscatory

in that said rates are not sufficient to cover the cost of hauling logs and other forest products in carload lots from logging branches of the said defendant railroad to the city of Alpena, and logs and other forest products in carload lots and otherwise between said city and Broadwell's Dam, and that said rates have been shown by practical experience to seriously and prohibitively impair the net profits and income of said defendant.

Second.

That said rates violate the provisions of the Fourteenth Amendment of the Constitution of the United States, in that no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor deprive any per-
38 son of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Third.

That the orders of the Michigan Railroad Commission set forth in the plaintiff's declaration as of date October 19th, October 22nd and November 3rd, 1909, were not in force and were inoperative and non-controlling until the 18th day of February, 1915, at which time said defendant issued its tariffs, making such rates and orders operative.

Fourth.

That on and after said orders were made by the Michigan Railroad Commission and between the dates of the several orders so made, the conditions prevailing on and along the various lines and tracks of said defendant's railroad, became and were changed in that the forest products constituting the subject matter of such orders fluctuated and became and were depleted and non-available for railroad transportation. Had such changed conditions obtained at and prior to the making of such orders different and higher tariff rates would have been made and would have been approved by the courts in their decrees, orders and determinations.

Fifth.

That by reason of the changed conditions as to forest products along and tributary to the various tracks of the defendant railroad, since the proofs were taken upon which the orders heretofore referred to were based, and by reason of the increased cost of operating the defendant's railroad, maintenance and every other thing connected with the operation of the defendant's railroad, taken in connection
39 with the fact that the defendant relied upon its published tariff; the giving effect to the orders above referred to from their dates instead of from the date of the making and posting of the tariffs thereafter, pursuant to court orders, would operate as confiscation of defendant's property, resulting in contravention of the spirit as well as the letter of all statutes and other laws controlling the operation of defendant's railroad.

Sixth.

That the giving effect to the said orders of the Michigan Railroad Commission from their dates would constitute a discrimination in favor of the plaintiff in this suit and against all other shippers who accepted and were controlled by the rates and tariffs, posted and published pursuant to the statutes in such case made and provided.

Seventh.

That the said orders of the Michigan Railroad Commission were in no wise controlling upon the defendant and were wholly inoperative until the final determination of all litigation relative thereto by virtue of a stipulation duly executed by the representatives of all parties interested, and relied on by this defendant, said stipulation bearing date December 2nd, 1909, entitled in the cause and reading as follows:

"It is hereby stipulated by and between the attorneys for the respective parties hereto, that the application for an injunction and the order to show cause made by said court and the hearing thereon, may be and is hereby continued in its present state until the final
40 determination of said cause upon the merits thereof.

Dated this 2nd day of December, A. D. 1909.

JOHN E. BIRD,
Attorney General.
JAMES McNAMARA,
Solicitor for Complainant."

It being the purpose of the attorney general and the attorney for this defendant, the Detroit & Mackinac Railroad, that said stipulation should and did operate to continue in full force and effect all posted and published tariff rates for the transportation of forest products until by an order of the court of last resort said defendant should be required to post and publish other or different tariffs.

Eighth.

Pursuant to said circuit court Rule No. 23 the defendant now here admits that on, to-wit, the 23rd day of November, 1909, and on the 11th day of March, 1909, and on the 24th day of April, 1909, certain parties filed three several petitions and complaints against this defendant with and before the Michigan Railroad Commission, therein alleging that they the said complainants considered themselves aggrieved by the asserted unfair, excessive, unreasonable and discriminatory rates, imposed upon them by the defendant with respect to the shipment and carriage of forest products; that thereafter said Railroad Commission issued three several orders or findings set forth in the declaration of the plaintiff hereinbefore referred to as orders of date October 19th, 1909, October 22nd, 1909, and supplemental order November 3rd, 1909, which said orders purport to have been made pursuant to Act No. 300 of the Public Acts of Michigan
41 for the year 1909; this defendant now here expressly denies the allegations in the plaintiff's declaration that by virtue and

reason of the issuance of said orders the said Michigan Railroad Commission "promulgated" and "gave effect" to such orders, and expressly denies that the allegations in the petition referred to warrant such orders; the defendant respectfully refers to its several answers made and filed to such petitions.

Ninth.

This defendant admits that, conceiving itself aggrieved by such orders, filed its bill of complaint in the circuit court for the county of Wayne, in chancery, pursuant to the statute in such case made and provided for the purpose of reviewing all proceedings before then had in connection with such orders; that from the decree made therein by the circuit court for the county of Wayne, in chancery, defendant appealed to the supreme court of the state of Michigan, and thereafter instituted proceedings in the district court of the United States for the eastern district of Michigan, for the purpose of further reviewing the proceedings before then had in connection with such orders; it, the said defendant, thereafter appealing to the supreme court of the United States from the order and decree made by said district court. That thereafter said plaintiff applied to the supreme court of the state of Michigan for, and obtained a mandatory order of date February 18th, 1915, by the provisions of which said order the said defendant was required to and did publish, post and put in operati*no* the freight tariff referred to in the plaintiff's declaration.

This defendant alleging that from the time of the filing of the three petitions hereinbefore referred to until the issuing of the
42 mandatory order on the said 18th day of February, 1915, the subject matter of said petitions was in process of litigation and that by virtue of the proceedings so had and taken and by virtue of the stipulation hereinbefore referred to and particularly set forth, and by virtue of the statute and laws controlling the same, it, the said defendant, lawfully and rightfully operated its said railroad and transported forest products according to the published tariff, and was not required during said time to transport forest products according to any other or different tariff of rates than the one so posted and published as aforesaid.

Tenth.

That during the time which elapsed between the findings and orders of the Railroad Commission, aforesaid, and the posting and publishing of the new tariff on the 18th day of February, 1915, no proceedings were had or taken by or on behalf of the plaintiff to set aside or annul the stipulation hereinbefore set forth in detail, nor to require this defendant to make, post or publish any other or different tariff of rates for the transportation of forest products than that by which it was lawfully controlled during said time.

Eleventh.

That on, to-wit, the 3rd day of November, 1909, the Michigan Railroad Commission made said Supplemental order in the cause en-

titled F. W. Gilchrist, Churchill Lumber Company, Island Mill Lumber Company, *com*plaintiff, vs. Detroit & Mackinac Railway Company, defendant, (D-188). That by the terms of such order it was provided as follows:

"This order may be rescinded, altered or amended at any
43 time when in the judgment of the commission such action should be taken."

From the date of said order until the final determination by the courts such commission has never exercised its judgment to the end that such order has been or could be rescinded, altered, or amended; said commission not having been petitioned to so rescind, alter or amend said order by reason of the uncertainty of the final determination of the issues so being litigated and for the further reason that no tariff of rates had been made, posted or published pursuant to such order; defendant therefor*t* insists that by express provisions of the order, the same did not and could not become effective and operative as against the said defendant until the final determination of the litigation and the posting and publishing of the tariffs as aforesaid.

Twelfth.

That the plaintiff did not reship over the defendant's railroad the manufactured product of the forest products shipped to its mill, by the said defendant entitling the said plaintiff to the said sum of fifty cents per thousand feet upon all forest products shipped to the plaintiff at Alpena as alleged in the declaration of the plaintiff.

Thirteenth.

In event said commission's orders shall be adjudged efficacious, defendant alleges that pursuant to subdivision (*g*) Section 10, Act No. 300, Public Acts of 1909, the said plaintiff should have complained to the Michigan Railroad Commission, asserting that the defendant has exacted for the transportation of the forest products irregular or exorbitant charges; and the said plaintiff should have
44 so complained (or petitioned) within six months from the date of such transportation; that by virtue of said law the said plaintiff could not institute proceedings for the recovery of irregular or exorbitant charges exacted at a time more remote than six months from the making of such complaint, and therefore the plaintiff cannot recover the demands made by it in its declaration and bill of particulars.

Fourteenth.

That no proceedings have been had or taken by the plaintiff before the Michigan Railroad Commission to determine the amount, if any, of the excessive or irregular rates or charges exacted by the defendant from the plaintiff as alleged in the plaintiff's declaration; that no proceedings at law in the circuit court for the county of Bay can be maintained for the recovery of irregular, exorbitant or excessive charges until such amount, if any, has been found and determined by such

Railroad Commission, all pursuant to said sub-division (*g*) of paragraph 10 of said Act 300 of the Public Acts of 1909.

Fifteenth.

The defendant proceeding in good faith to adjudicate the legality of the said three orders of the commission, could not complain to said commission pending such adjudication and relying on the determination of the supreme court that the commission's findings were not conclusive and that they establish no more than a prima facie determination; defendant cannot be required to refund an amount to plaintiff equal to the difference between an established and a posted and published tariff of rates and an unposted and unpublished rate named in orders awaiting judicial approval.

45 Sixteenth.

That the three several orders of the Michigan Railroad Commission referred to in the plaintiff's declaration, as of dates October 19, October 22 and November 3, 1909, (said orders being hereinbefore referred to), are void and voidable and cannot be recovered upon by reason of Act 300 of the Public Acts of 1909, as amended, because said Michigan Railroad Commission had no jurisdiction to make and issue such orders, and because the petitions required by the statute in such case did not make the statutory allegations required as a basis for the making of the orders referred to; and because the complaint before the Michigan Railroad Commission, dated April 21, 1909, upon which the orders of said commission of October 19, 22 and November 3, 1909, were based, charging a discrimination in log freight rates between points south of Cheboygan into Alpena and north of Alpena into Cheboygan, were equalized by a new tariff known as M. R. C. No. —, which became effective June 1st, 1909, and was effective, and equalized, and such alleged unjust discrimination absolutely removed before the hearing had on said complaint, June 3rd, 1909, and that there was no legal complaint before said commission upon which to base said orders as aforesaid, and that said commission was without jurisdiction to make said orders, and the same became and was and are an invasion of the constitutional rights of said defendant, and in violation of the fourteenth amendment of the Federal constitution of the United States.

(See stipulation and Exhibit 12, p. 454, record of so-called "rate" case, supreme court of Michigan.)

That at the time of the making and issuing by the Michigan Railroad Commission of the orders heretofore referred to, designating a tariff of rates, such orders bearing dates October 19,
46 October 22 and November 3, 1909, several certain tariff of rates on freight and forest products into and out of Alpena, being the tariff of rates in force at and prior to the dates of such orders last hereinbefore referred to, and in force and effect, published and posted, pursuant to Section 10 of Act 300 of the Public

Acts of 1909, and were designated as G. F. D. No. 147, dated Bay City, Michigan, November 20, 1903, set forth on page 447 of the printed record in the so-called rate case, and M. R. C. 198 of date January 7, 1909, to take effect January 19, 1909, set forth on pages 448 and 449 of the printed record in the so-called rate case, which said tariff of rates had been approved by the Michigan Railroad Commission. Also tariff of rates duly filed, pos-ed and published designated as M. R. C. 205, and M. R. C. 208, and M. R. C. 201, and all other tariff of rates for the transportation of freight and forest products to and from Alpena city, state of Michigan, posted, published and effective before and after and at the time the Michigan Railroad Commission made their orders of dates as aforesaid, October 19, October 22, and November 3, 1909.

Such tariff of rates will be offered in evidence and their contents established on the trial of these cases. The purpose of this notice is to comply with Rule 23 of Michigan Rules controlling circuit court cases relative to defense made by the defendant in this cause. Knowing that the plaintiffs and their attorneys are familiar with such existing taric- of rates, we do not herewith set forth such tariff of rates in detail. If required to do so, however, a copy of such posted, published and effective tariff of rates will be furnished to the attorneys for the plaintiffs at their request.

47 Eighteenth.

That the defendant on the trial of the causes above entitled will insist and give evidence relative to all tariff of rates pertaining to the transportation of freight, logs and forest products into, and the manufactured product therefrom out of the city of Alpena, aforesaid, from the date of the three orders set forth in the plaintiffs' declarations, and before and after such dates; that said plaintiffs have in no wise proceeded before the said railroad commission, nor in the courts to the end that such rates independent of the rates made on October 19, October 22 and November 3, 1909, have been cancelled or have become ineffective until on and after the 18th day of February, 1915.

The purpose of these amendments is to comply with Circuit Court Rule 23 and if the plaintiffs or their attorneys require other or further particulars of the rates hereinbefore referred to in order that defendant may comply with such rule, such data or papers, orders or tariffs will be supplied to said plaintiffs or their attorneys on request, or in case such plaintiffs or attorneys indicate in any wise the insufficiency of this supplemental amended plea.

The pleadings in this cause were originally made and filed prior to the adoption of the new rule controlling pleas and notices; and while to a certain extent this amended plea is made with an effort to comply with Rule 23, as now enforced, the said defendant does not herein waive any of its legal rights in connection with the making of the plea and notice of special affirmative defenses, but in an effort to avoid unnecessary expense incident to the proofs

48 which shall be submitted on the trial of this cause, it has endeavored to comply with such rules as far as hereinbefore stated and set forth.

Respectfully submitted,

JAMES McNAMARA,
Attorney for Defendant.

Dated 22nd day of August, 1916.

Business address: 2026 Dime Bank Bldg., Detroit, Mich.

HENRY & HENRY,
Of Counsel.
Opera House Block, Alpena, Mich.

To Messrs. Gillett & Clark, Attorneys for Plaintiff. Business address: Shearer Block, Bay City, Mich.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Exceptions for Overruling Demurrer.

(Filed October 30, 1915.)

Now comes the defendant, by James McNamara, its attorney, and Henry, Henry & Henry, of counsel, and hereby excepts to the decision and ruling of the court made on the seventh day of July, 1915, wherein said court overruled and disallowed the de-
49 murrer before then interposed on behalf of the defendant to the declaration of plaintiff.

Exception is also hereby taken by and on behalf of said defendant to the reasons for overruling such demurrer filed in said cause on, to-wit, the 30th day of June, 1915.

JAMES McNAMARA,
Attorney for Defendant.
HENRY, HENRY & HENRY,
Of Counsel.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

More Specific Bill of Particulars.

(Filed December 31, 1915.)

The bill of particulars consists of 163 pages, and its general nature is as follows:

The first 49 pages consist of schedules showing in detail the items of claimed overcharges for the switching of cars to Fletcher's Dam. Each car is separately listed and each item shows the date, car initial and number, the originating point, destination, and the nature of the load.

Pages 50 to 163 inclusive of the bill of particulars contain a statement of the claimed overcharges on log shipments to Alpena. Each item is separately listed under the following column heads, viz:

50 Expense bill number; car number; originating point; amount charged; number of feet on car; miles hauled; rate per thousand; freight should be.

The schedule for 1909 contains the following explanatory statements:

Statement of Branch shipments.

McKay's was a camp of the Fletcher Paper Company located on the main line half way between Tower and Onaway.

McMillan's was a camp of the Fletcher Paper Company located on Pollock Spur, off the Cleveland Branch, five miles south of Tower.

Morrison's was a camp of the Fletcher Paper Company located on the main line three miles west of Tower.

Martindale's was a camp of the Fletcher Paper Company located on the Tubb's Branch four miles south of Case.

Sabin's was a camp of the Fletcher Paper Company located on the Cleveland Branch two and one-half miles south of Tower.

Logs were loaded at or very near the above named camps as shown by the following statement.

All logs shown us from Gilchrist Spur or Branch were loaded not more than five miles from Tower.

The schedule for 1910 contains the following explanatory statements:

Statement of Branch Line Shipment.

McKay's was a camp of the Fletcher Paper Company located half way between Tower and Onaway. Logs shown from McKay's were

loaded at that point. Logs shown as originating on the Indian river branch and Gilchrist branch were loaded within five miles of Tower station.

51 The schedule for 1911 contains the following explanatory statement:

Statement of Branch Line Shipment.

Logs shown as originating on the Indian river branch and Gilchrist branch were loaded within five miles of the Tower station.

The schedule for 1913 was in two parts, the first part consisting of a schedule of claimed overcharges of the same nature as the schedules for the previous years, and the second part consisting of a claim for $1.00 per thousand feet for logs loaded on the Onaway & North Michigan Railroad, which schedule was preceded by the following explanatory statement:

"The cars shown on this and following pages for the year 1913 were loaded on the Onaway & North Michigan Railroad and were delivered by that company to the Detroit & Mackinac Railway at Onaway, Michigan, for transportation to Alpena. Through rate charged was $4.50 per thousand feet, divided $1.50 per thousand feet for the O. & N. M. Ry. as shown by paid expense bills."

The order of the Michigan Railroad Commission dated October 19, 1909, prescribes a rate of $2.00 per thousand feet for distances over 30 miles, and not exceeding 50 miles. Onaway is within the aforesaid distance from Alpena, and the D. & M. Ry. collected $1.00 per thousand feet in excess of the rate ordered by the Railroad Commission, amounting to $1,502.03 as per detailed information following.

The schedule for 1914 was in two parts, the first part consisting of a schedule of claimed overcharges of the same nature as the schedules for the previous years, and the second part consisting of a claim for $1.00 per thousand feet for logs loaded on the

52 Onaway & North Michigan Railroad which schedule was preceded by the following explanatory statement:

The cars shown on this and the following pages for the year 1914 were loaded on the Onaway & North Michigan Railroad and were delivered by that company to the Detroit & Mackinac Railway at Onaway, Michigan, for transportation to Alpena. Through rate charged was $4.50 per thousand feet, divided $1.50 per thousand feet for the O & N. M. R. R., $3.00 per thousand feet for the D. & M. Railway, as shown by paid expense bills. The order of the Michigan Railroad Commission dated October 19, 1909, prescribes a rate of $2.00 per thousand feet for distances over 30 miles and not exceeding 50 miles. Onaway is within the aforesaid distances from Alpena, and the D. & M. Ry. collected $1.00 per thousand feet in excess of the rate ordered by the Railroad Commission, amounting to $1,107.18 as per detailed information following.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Stipulation Annexed to Bill of Particulars.

(Filed December 31, 1915.)

It is hereby stipulated as follows:

53 Plaintiff has filed a "more specific bill of particulars" containing a detailed statement of the originating point, load, destination and number of the cars containing the logs for which overcharges are claimed, and specifying the details of plaintiff's claim in other particular. This bill of particulars has been checked and verified by the representatives of both parties, and the following corrections are agreed to, viz:

(Here follow a list of detailed additions and corrections under the headings of "switching charges" and "log freights." The stipulation then continues as follows:)

Certain footings of the said bill of particulars should also be changed, leaving the following as a recapitulation of the bill of particulars:

	Switching.	Logs, general.	Onaway & N. M.
1909	$469.50 (p. 1)	$4,117.62 (p. 78)	
1910	804.00 (p. 6)	2,747.53 (p. 98)	
1911	1,369.00 (p. 13)	2,090.87 (p. 117)	
1912	1,557.50 (p. 23)		
1913	1,328.50 (p. 34)	2,930.92 (p. 133)	$1,502.31 (p. 139)
1914	1,070.50 (p. 44)	4,589.81 (p. 163)	1,107.54 (p. 163)

Total switching charges	$6,599.00
Total log freights, general	16,476.75
Total Onaway and North Michigan	2,609.85
Grand total	$25,685.60

With the above changes, plaintiff's "more specific bill of particulars" has been found correct in respect to its statements of fact.

54 For the purpose of saving the appointment of an auditor or the submission of the details of plaintiff's claim to the court or jury, it is hereby stipulated that all items, figures and statements of fact contained in said "more specific bill of particulars" as amended by this stipulation are correctly stated and shall be treated as true on the trial of this cause. This stipulation shall be construed as applying only to statements of fact as such, and not

to any legal conclusions or claims of liability deduced from such statements of fact, or claimed to result therefrom, and shall not be considered as waiving, conceding or in any wise affecting the question of the existence or non-existence of any legal liability growing out of the facts aforesaid.

GILLETT & CLARK,
Attorneys for Plaintiff.
JAMES McNAMARA,
HENRY, HENRY & HENRY,
Attorneys for Defendant.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, RICHARDSON LUMBER COMPANY, Island Mill Lumber Company, Churchill Lumber Company, Michigan Veneer Company, Plaintiffs respectively,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

55 *Stipulation for Consolidation of Cases.*

(Filed December 31, 1915.)

For the purpose of facilitating the trial of these cases, it is hereby stipulated as follows:

A bill of particulars and a more specific bill of particulars have been furnished in the Fletcher Paper Company case, and bills of particulars similar to the more specific bill of particulars in the Fletcher Paper Company case have been furnished in all of the other cases. The more specific bill of particulars in the Fletcher Paper Company case has been checked by defendant, and certain amendments which have been agreed upon will be made by a stipulation to be hereafter filed. In the other four cases, the bills of particulars furnished will be checked over by defendant's accountants as rapidly as possible, and a list of the disputed or incorrect items (if any) will be furnished plaintiff's attorneys in each case, as soon as possible, and an effort will be made to ascertain and agree upon the facts in regard to each. A stipulation covering the facts, so far as they can be agreed upon, will be filed in each case, leaving in dispute upon the trial only such items (if any) as cannot be disposed of by such stipulations. In order to satisfy plaintiffs that the work of checking up the bills of particulars is proceeding with reasonable speed, any representative of the plaintiffs may at any time make inquiries at the office of the defendant at Alpena and will be given information in regard to the rate of progress that is being made.

Defendant will make all possible efforts to complete the work of checking up the bills of particulars promptly so that the cases

may be tried at the earliest date consistent with the comple-
56 tion of that work. If that work can be completed during the December term of the circuit court for the county of Bay, then the said cases shall be placed upon the docket for that term to be tried as soon as possible thereafter. If there is any unreasonable delay on the part of the defendant, plaintiffs may apply to the court by motion on the usual four days' notice, and the court, on the hearing of said motion, may set the cases for trial or may make such other order as may seem to him proper for the purpose of expediting the preparation and trial of the cases.

All of the cases shall be consolidated for trial as far as possible in the following manner:

All of the cases shall be submitted to the same jury (or to the court) at the same time. If the attorneys for all parties can agree that there are no questions for a jury, a jury will be waived by all parties. The parties will first introduce so much of their evidence as may apply jointly to all of the cases, and will then introduce separately the evidence applying to each one of the cases separately, and the court or jury shall make a separate finding or verdict as to each with the same effect as if they had been separately tried. A separate judgment shall be entered in each case.

GILLETT & CLARK,
Attorneys for Plaintiffs.
JAMES McNAMARA,
HENRY, HENRY & HENRY,
Attorneys for Defendant.

Dated, December 31, 1915.

57 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Stipulation as to Evidence and Trial.

(Filed March 30, 1916.)

Defendant has requested a continuance to the May, 1916, term of the circuit court for the county of Bay, on account of the illness of Mr. Fred A. Baker. Plaintiff is opposed to the granting of such a continuance but hereby consents to the same on the following conditions and in return for the following stipulation made on behalf of the defendant:

1. Defendant agrees to ask for no further delay on account of the illness of said Baker, but in case his illness continues, to proceed with the trial of the case in his absence at the May term of court.

2. When the docket is called for the May term of court which convenes May 15th, 1916, this case, (together with the other four

cases consolidated with it), may be set for trial prior to June 1st, 1916. If both parties to this suit are willing to waive a jury trial, these consolidated cases shall be tried prior to the trial of jury cases if the court will consent thereto, otherwise the cases shall be placed on the jury calendar for trial as above stated.

3. Upon the trial of the five consolidated cases herein referred to as the refund cases, copy of the printed record in each of the following cases may be offered in evidence (subject only
58 to the objection or objections of either party as to the competency, relevancy and materiality as substantive evidence), as proving itself and its contents with the same effect as if the said record and all of the contents thereof were duly authenticated and certified, viz:

(*a*) The printed record in the case of Detroit & Mackinac Railway Company vs. Michigan Railroad Commission, reported in 171 Michigan 335.

(*b*) Detroit & Mackinac Railway Company vs. Michigan Railroad Commission, reported in 235 U. S. 402.

4. The following formal facts are conceded without proof:

(*a*) That on July 25th, 1914, a writ of mandamus was granted by the Michigan supreme court according to and as appears from the opinion in the case of Michigan Railroad Commission vs. Detroit & Mackinac Railway Company, 182 Mich., 234.

(*b*) That on December 14th, 1914, the supreme court of the United States affirmed the decree of the district court of the United States for the eastern district of Michigan, according to and as appears from the opinion reported in 235 U. S., 402, and that a decree was thereupon entered in accordance with said opinion.

(*c*) That on December 28th, 1914, the United States district court for the eastern district of Michigan, entered its decree dismissing the bill of complaint of the complainant, Detroit & Mackinac Railway Company in the last mentioned case.

(*d*) That on February 18th, 1915, the defendant, the Detroit & Mackinac Railway Company, issued and gave effect to its tariff "G. F. D. No. 775 A" all as set forth in plaintiff's declaration filed herein.

5. On or before April 15th, 1916, defendant's attorneys
59 will give to plaintiff's attorneys a definite answer in writing relative to the acceptance on behalf of defendant of the communication made as of date March 15th, 1916, by plaintiff's attorneys. In case of failure so to do it is hereby agreed that such proposals in such communication are accepted on behalf of defendant.

In consideration of the above the attorneys for the plaintiff hereby consent to the continuance of this case until the May, 1916, term of court without costs.

Dated, March 29th, 1916.

JAMES McNAMARA,
Attorney for Defendant.
HENRY & HENRY,
Of Counsel for Defendant.

GILLETT & CLARK,
Attorneys for Plaintiff.

STATE OF MICHIGAN,
County of Bay, ss:

Pursuant to Circuit Court Rule No. 68, the appellants have attached to the bill of exceptions heretofore duly certified by me (but separate therefrom), copies or a fair abstract of each material pleading, document, order, judgment and other proceedings of record, all arranged chronologically as required by said rule; and at the request of the parties hereto I have this day duly settled and hereby certify the same as the transcript of the record to be returned with the writ of error by the clerk of the circuit court for the county of Bay to the clerk of the supreme court of the state of Michigan, which said transcript shall be the record for said supreme court for further action in connection with the appealing of said cause.

60 I further certify that a part of such transcript is the stipulations of the parties as to the application of the proceedings had and taken before the judge of the circuit court for the county of Bay, in the case of Fletcher Paper Company vs. The Detroit & Mackinac Railway Company, to the instant case and to the other so-called refund cases; judgments being rendered in all cases therein referred to November 27, 1916.

Dated, April 14, 1917.

S. G. HOUGHTON,
Circuit Judge.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, a Corporation, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, a Corporation, Defendant.

Bill of Exceptions.

The issues joined between the parties in this cause came on to be tried September 19, 1916, before the Honorable Lewis P. Coumans, circuit judge, sitting by consent of the parties, without a jury.

Edward S. Clark, of Gillett & Clark, appeared as attorney for plaintiff. Messrs. James McNamara, Charles R. Henry, James E. Duffy and Fred A. Baker appeared as attorneys for defendant.

61 An opening statement was made by plaintiff's attorneys as follows:

Mr. Clark: These cases all grow out of the same proceedings before the Michigan Railroad Commission, and the same proceedings in the court; the five plaintiffs are merely affected somewhat differently by the same rulings, orders, and litigation; the difference

lies merely in the application of the law to the five different plaintiffs. All are shipping logs in, but shipping out different kinds of manufactured products, and the amounts shipped by each differ from the amounts shipped by the others, but the foundation of the entire controversy at the present time is what we call, for convenience, the "rate litigation," which commenced before the Michigan Railroad Commission and went through all the courts of this state and all the Federal courts until it finally reached the supreme court of the United States.

We will offer in evidence all of the records and files, pleadings and briefs in these cases, not because the court has at the present time to re-try any of those issues, because you do not, it is not a question that the judgment in these cases are conclusive at the present time, but the question of what was settled by these cases will come up, and therefore we will offer in evidence those files and records merely to show to the court the scope of that litigation, show what it covers, what was done, what was done by the parties, and what they omitted to do or could have done, so the offer of those proofs will be more for the history of the case, and that will be practically the entire object of them, and it will not be under our theory of the case—they will not open the same questions again to be tried here; the question to be tried here we consider very simple,
62 and our legal theory, which is a part of our opening statement, I think properly, the effect of those cases was to settle practically by legislative enactment the amount in dollars and cents which could legally be charged for the carriage of logs to Alpena, that it was just as though the legislature had passed a statute fixing the rate, and that, therefore, all the court in this case has to do, and all that the court in this case can do, is to compare the rate that should have been charged with the rate which was charged, and give us a judgment for the balance with interest.

The original complaints were made before the Railroad Commission in 1909. At that time changes were made in the tariffs, as the railroad men call railroad rates, in the tariff on logs to Alpena.

The rate which we complained of in the old litigation was promulgated by the Railroad Company on January 20, 1909, went into effect February 1, 1909, and fixed rates from various stations on the road to Alpena at either three dollars or three and a quarter per thousand feet log measure. The tariff was practically $3.25 a thousand for all distances over 40 miles, and $3.00 a thousand for distances less than 40 miles on all classes of logs; that was called M. R. C. 205, and that, I think, will be referred to frequently. That means Michigan Railway Commission, and it is the number they give to it. As I understand, when these tariffs are filed with the Railroad Commission they give them all numbers.

At about the same time, and effective 20 days later, the Railroad put into effect another tariff based on a mileage basis, naming no stations of consignment or receipt of the logs, but saying that the rates will be so much for 10, 20 or more miles, so much between 10 and 20 miles, so much between 20 and 30, etc., and a footnote at

the bottom of that statement excepted cases where special
63 tariffs were in force, the effect being to except the city of Alpena from the operation of the mileage tariff. A comparison of the two tariffs show that the shippers of Alpena were getting a much higher rate by that method than any other station on the line, the mileage tariffs figured in each case less to Cheboygan or to or from Onaway, or other stations on the line than to Alpena.

The complaint was then made very properly by the shippers, there were a number of complaints, I think some of them were consolidated on the orders of the Railroad Commission.

There were some side issues on the question in addition to the log shipment question; there were some separate controversies with the Fletcher Paper Company over switching some of their cars. The plant of the Fletcher Paper Company is not all in one location in Alpena; there is the main paper mill, so-called sulphide plant, where they make paper from one process in the city, and some miles distant, we will say, at a rough guess, from three to five miles distant, is the pulp mill where they grind up certain classes of pulp wood, and that pulp mill—there must be communication between the two plants—the pulp from the pulp mill must be brought to the paper mill to be used, and there was a controversy at some time over the charge for switching cars from the pulp mill at Alpena to the Paper Mill. The rate had been $2.00 per thousand, or per car, and about the same time that this increase of rates through Alpena was made on logs, the railroad increased that rate from two to five dollars per car, and at the same time there were other controversies with the Fletcher Paper Co., all of which got before the Railroad Commission—whether the dam where the pulp mill was located
64 should have the same rate as at Alpena; that is, when a car came in consigned to the Fletcher Paper Co., whether it could be taken to their pulp mill or paper mill, either one, for the same price, or whether it would have to be brought to Alpena and have an additional charge for switching to go to the pulp mill. These things all resulted in various complaints to the Railroad Commission; the Fletcher Paper Co. made a complaint in regard to log rates on February 23, 1909, another complaint in regard to the switching to Fletcher's dam on March 11, on April 19, 1909, a complaint was made by Gilchrist, the Churchill Lumber Co., and the Island Mill Lumber Co. in regard to the log tariff, claiming the rates charged were unjust and unduly discriminatory. On April 24, 1909, the Fletcher Paper Co. filed a complaint in regard to Fletcher's Dam as a terminal point. The hearings on those various complaints were, to some extent, combined before the Commission and orders were finally made later in that same year; in October and November the Railroad Commission granted practically all of the relief asked for by the shippers—did not grant all the relief, but they granted relief to some of the shippers. In referenec to the switching charge, they split the difference—that only affects the Fletcher Paper Co.; they split the difference and gave the railroad company $3.50 a car; in regard to making the Fletcher dam a terminal point with the same rates charged as to Alpena, they allowed the prayer of the Fletcher

Paper Co., and that controversy died right there; the railroad company never raised that question later, and that is really out of the case, because the railroad company conceded that, no attack has been made upon that in later litigation. The log rate was changed by the commission to equal the mileage rate, that is, they
65 took the rate made by the railroad company applying to other points than Alpena and said this rate was also to apply to Alpena. They really enacted it with no other change than that. They made a supplemental order a few days later to cure an oversight in which they had forgotten to specify a maximum of logs to a car, the idea being to protect the railroad company against having to use a freight car for a few logs, requiring the shipper either to load or pay for a full car. That was covered in a supplemental order made a few days later, but the final act of the Railroad Commission was completed so far as this case is concerned, on the 3d day of November, 1909, when the supplemental order was made.

An important part of this freight rate was this: The Railroad Company had claimed that it was proper to give a lower rate to shipments, especially to Onaway, because it got their shipments of manufactured products also. Onaway especially, which had no other railroad connection and no water connection, and they complained that Alpena shippers were shipping the manufactured product by water, and it was proper to charge a higher freight on the inbound logs for that reason. The Railroad Commission took care of that by providing in the order that 50 cents per thousand more should be charged on all logs the manufactured product of which did not go out again over the Railroad. That differential was sanctioned by custom both on this and other roads, but the basis of it will appear as the evidence goes in, and it was the difference which had been shown by the railroad company itself as a proper differential in such cases; the commission therefore increased the mileage tariff $.50 a thousand to Alpena in every case where the manufactured product was not re-shipped over the line of the defendant road, so
66 it gave the railroad the mileage rates plus $.50, wherever the manufactured product was not re-shipped, and the mileage rates as they stood where the manufactured product was re-shipped.

Very promptly after the filing of these orders by the Railroad Commission, the railroad company filed a bill of complaint in the Wayne Circuit Court to enjoin the operation or enforcement of these orders. That was on the 20th day of November. The orders took effect by their terms and the terms of the statute 20 days after service. The different orders were served at different times. The switching rate order, affecting the Paper Company only, was served November 4, 1909, so the switching rate took legal effect 20 days thereafter, on November 24. The log tariff was covered by the two orders, one the main and one the supplemental order, and the supplemental order not being served until the 6th of November, we must concede that did not take effect until November 26th, so prior to the time that took effect the Railroad Company had filed this

bill of complaint in the Wayne Circuit Court, on the 20th of November.

That was a bill of complaint filed against the Michigan Railroad Commission only, not against the Alpena shippers, and the purpose of it was to enjoin the enforcement of these orders of the Commission. A few months later—the petitions were filed in January and the orders made in February, 1910—these shippers, the Island Mill Lumber Co., Fletcher Paper Company, and Gilchrist, filed petitions to intervene as defendants, and they were permitted to intervene, and, thereafter, were called intervening defendants in the rate litigation. Later still, certain shippers of Cheboygan and other districts north of Alpena filed petitions to intervene as plain-
67 tiffs, stating they were interested adversely to the Alpena shippers, and they were permitted to intervene. A large amount of testimony was taken. This large volume contains the record in the so-called rate cases. It covers 804 printed pages. I should have said first that testimony was taken before the railroad commission, a comparatively small amount; the large volume of the testimony was taken in the Wayne Circuit court. The Railroad Act provides that in such litigation, after the testimony has been taken in the Circuit Court in an injunction proceeding, if the testimony is other or different from or in addition to—I will not quote the exact words of the statute—but that is practically what it says—than the testimony taken before the railroad commission, the Circuit Judge must send the whole case back again to the Railroad Commission, so as to get the revised opinion of the Railroad Commission on the new evidence that was taken in the case. Judge Murfin, of the Wayne Circuit Court, referred the case back to the Railroad Commission to give the Railroad Commission another chance, or a chance to modify its opinion as it thought best before the Court took it up as a Court. That being done, the Railroad Commission again reported it back, reporting their opinion and finding unchanged, and then Judge Murfin took it up for consideration as the Wayne Circuit Court.

The reaffirmance of the orders of the Railroad Commission was in 1910, and Judge Murfin filed his opinion in January, 1911. His opinion will be read in evidence. I will not attempt to summarize it here, but it confirmed the orders of the Railroad Commission and dismissed the bill of complaint.

The Railroad Company then filed an appeal to the Supreme Court of Michigan. It was a year and a half before it was finally
68 decided here. I have here the record of the case in the supreme court of Michigan. It was argued at length and the opinion of supreme court is found in the 171 Michigan 335. It affirmed the decree of the Wayne Circuit Court decree dismissing the bill of complaint and leaving the Railroad Commission rates in force. The Railroad Company applied for a writ of error direct from the Supreme Court of the U. S., to the Michigan Supreme Court. This was refused by both the Michigan Supreme Court and one of the justices of the United States Supreme Court, and a new bill of complaint was then filed in the Federal Court in Detroit, the

United States District Court for the Eastern District Michigan, covering very much of the same ground as the bill of complaint filed in the Wayne Circuit Court. We demurred to that, or moved to dismiss under the new practice, and also filed objections to the granting of a preliminary injunction, which was one part of the relief asked for. Under the federal statute where a litigation of that kind involves the constitutionality of a state law it is necessary for three judges to sit and hear the case. The theory of the railroad company there was that the matter was not res adjudicata, because the proceedings in the Michigan courts were rather legislative than judicial in their nature, that they really had not had their day in Court. That was overruled by the three judges and the injunction denied on the ground that the Railroad Company had had its day in Court, and that the questions should not be re-opened. That was appealed to the U. S. Supreme Court. The U. S. Supreme Court affirmed the judgment of the District Court on that ground.

While the case was pending in the United States Supreme Court, we filed an application in the Michigan Supreme Court for
69 a writ of mandamus to compel the Railroad Company to put these rates into effect. The orders required them to go into effect 20 days after the date of the orders, which would be November 26, 1910.

A stipulation had been filed by Attorney General Bird, representing the Railroad Commission, in the Wayne circuit court, after an order to show cause had been made, agreeing that the order to show cause and the proceedings thereon should remain in statu quo until the final determination of the case, so when the shippers intervened they found that state of affairs. This stipulation was made before intervention, and the Railroad Company had therefore been collecting through all these years of litigation, not these Commission rates, but the higher rates which had been complained of and which had been lowered by the Commission.

The application for mandamus was made and a writ of mandamus granted by the Supreme Court ordering the Railroad Company to put into effect the Commission rates. There was some controversy over that, and instead of doing it promptly there was some discussion as to the meaning of the order, which resulted finally in new proceedings in the Supreme Court to punish the Railroad Company for contempt in refusing to put into effect the Commission rates, and the Railroad Company was adjudged guilty of contempt, and then, or shortly afterward, the rates were finally put into force. That was on February 18, 1915. So that practically 5 years and 3 months after the Railroad Commission made these rates they were given effect by the Railroad Company, and they have been in effect since.

Our claim, therefore, is for the excess payments made during those five years and some months after the orders of the Railroad Commission became effective by law, and the date when we
70 actually obtained the benefit of them through an actual decrease in rates.

There will be no question in respect to the amounts due, I think, for the reason that the parties got together and used a labor saving

device to determine the actual amounts paid. It was first planned to have an auditor appointed and counsel finally decided that we should do it ourselves; that we could do everything an auditor could, so in each case the plaintiff's and defendant's accountants got together, checked up the expense bills, and made a stipulation, attached to the bill of particulars in each case, making such corrections as were required, stipulating that the amounts paid were so much, and that the statement of facts contained in the bill of particulars was correct, leaving the application of those facts an open question. Of course, no waiver was made by either party on questions of law in regard to the application of the facts.

We have before us in a very convenient form the bill of particulars in one case, getting before the Court, I think, almost entirely questions of law and questions of fact will be, I think, non-existent if any.

The amounts involved are large; in round numbers, the Fletcher Paper Co. claims something over $25,000; the Richardson Lumber Co., $28,000; the Island Mill Lumber Co., $24,000; the Churchill Lumber Co., $14,000; the Michigan Veneer Co., $6,000 and we claim the right to have all those amounts doubled under the section of the Railroad Act which provides that whenever any public service corporation or railroad company or party to proceedings before the Commission—I am quoting liberally again without attempting to use the exact language of the statute—refuses to comply
71 with the legal order of the Commission the recoverable damages shall be doubled.

I think that is enough of a statement, in view of the fact that our evidence will come in in chronological order, so that I think your Honor will be enabled to follow it and get the details of the statement as we go along.

(Recess taken until 2 o'clock.)

Afternoon Session.

Mr. Clark: One subject I did not cover, a difference as to how the $0.50 refund from manufactured products shipped out ought to be computed. With almost all of these companies the question won't arise, the three companies which are in the saw mill business shipped their lumber out by boat or railroad, and what went out by rail, of course, went over this one railroad in Alpena, and the bill of particulars shows how much was re-shipped and how much reduction we are entitled to, if we are entitled to any. The Fletcher Paper Co.'s situation is somewhat complicated for this reason; that they shipped in raw material both by rail and water, a good deal of it comes down the Thunder Bay River, a negligible amount comes in by team, and they ship out paper both by rail and water, but they ship in, we will say, at a rough estimate,—not intended to be accurate, but fairly so—say, 50 per cent of their raw material by rail and ship out 95 per cent of their manufactured product by rail; so they shipped out an amount equal to all the logs that came in by rail; and 80 or 90 per cent of the water logs also. Now, it will be a

question of law in the case—whether it is sufficient for us to show that we ship out as much paper as logs that went in, whether we shipped out manufactured product of paper equal to the
72 amount of logs we shipped in over the Railroad Company in each case. There is no dispute, there can not be any dispute here, and so I assume there is none, that we not only did that, but shipped out a great many million pounds more than that. The defendant's theory will be that we must show that we shipped out the paper manufactured from the identical logs that came in by rail, and if we shipped out some paper made from water logs we were not entitled to the reduction of $-.50 per thousand on the manufactured product shipped out. That is really a question of law to be threshed out in the argument, and some depositions bear on that point.

Another thing that I should have mentioned this morning, because it is really a part of the history of the case, although an occurrence which post dated the commencement of the suit, that many of the legal questions in the case were raised by demurrer, were argued before Judge Collins, and Judge Collins filed an opinion over-ruling the demurrer. I will not go into the details of that at present, but it is part of the theory of our case that Judge Collins' ruling, so far as it went, established the law of the case, and those decisions should not be disturbed except by an appellate Court.

Another word of explanation in respect to the use of these printed briefs and records. There is a stipulation covering the record in the main rate case before the supreme court of Michigan and the record in the United States Supreme Court stipulating that those records can be used as proof of their contents with the same effect as though we had certified copies. In addition we expect to offer the printed briefs in these two cases. Also the records and briefs in the mandamus case and in the contempt case, and we offer those, not claiming that they are substantive proof in this case, (be-
73 cause we do not contend there is any necessity of making proofs of the facts there stated,) but we offer them as part of the history of the litigation, showing what counsel claimed on both sides, and what the different courts had before them for decision, thinking of the necessity of referring to these records and briefs more or less in order to clear up the present issue on the argument.

Now, in offering these we do not intend to read all of them, we will read certain selections from the printed record such as we think will enlighten your Honor, but we will offer all of these, and I say this as much for counsel's benefit as your Honor's so they can make their objections, if they have any to meet our theory. We take the position, which was settled by Judge Tuttle in some litigation in the Federal Courts and I think will be conceded, that we have a right to offer voluminous records and documents of this kind without reading them if we see fit. The result of our offer is that the documents are then in the case and counsel for either party have a right to refer and to read such parts as they wish, and we will merely select brief extracts from the record, and we will have the

extracts we read identified by a separate sub number of some kind, so there will be no question as to just what was read and what was not, before Your Honor.

Mr. Clark: Certain documentary evidence was thereupon offered in evidence by plaintiff as follows: Under the stipulation I offer in evidence as Exhibit I the copy of the printed record in the rate case, being the case that was decided by the Supreme Court of Michigan and reported in 171 Michigan, page 335.

Such extracts as I read from this I will have marked
74 as I read them, Exhibits 1-*a*, 1-*b*, etc.

As exhibit 2 I offer in evidence the printed copy of an argument, headed "Arguments for complainants in Court below," entitled in the Supreme Court in the case in question.

As Exhibit 3 I offer in evidence the brief for complainant and appellant in the same case. And as an additional means of identifying the brief, it has 163 pages.

As Exhibit 4, I offer in evidence a brief endorsed "Brief for Intervening Complainants and Appellants." This is a printed brief of 65 pages.

As Exhibit 5 I offer in evidence the brief of the Attorney General for the defendant, Michigan Railroad Commission, in the same litigation, this being a brief of 55 pages.

As Exhibit 6, I offer in evidence the brief of Gillett & Clark for the intervening defendants in the same case, being a brief of 99 pages. This completes the briefs and records in this particular case, as reported in the 171 Mich.

The extracts which we will offer from this record will be quite full, as far as concerns the pleadings before the Railroad Commission, because they were the foundation of the present controversy. The remainder of the record will be merely indicated very scantily.

The first document which I will read from the record, which I will call Exhibit 1-*a*, is the first occurrence in point of time in which we are interested, that is, the first tariff, M. R. C.-205, which was dated January 20, 1909, made effective Feb. 1, 1909. This is read from pages 129 and 130 of the record.

(From 171 Michigan, page 353.)

As Exhibit 1-*b*, we offer in evidence the mileage tariff so-called,
which was M. R. C.-28; this is dated February 8, 1909,
75 became effective Feb. 20, is found on page 345 of the opinion of the Michigan Supreme Court in Vol. 171 of the Michigan reports; it is also found in the record, Exhibit I, on pages 131 and 132, but there are some clerical errors. For indentification we will mark page 132 of the record as Exhibit 1-b.

(Exhibit read.)

As exhibit 1-*c*, we offer in evidence the complaint of the Fletcher Paper Co., dated Feb. 23, 1909, filed with the Railroad Commission and found on pages 1 to 4 inclusive of Exhibit I. It is entitled before the Michigan Railroad Commission, in the name of the complainant and defendant and states as follows:

Mr. McNamara: That complaint of the Fletcher Paper Co. was withdrawn before the Michigan Railroad Commission by the Fletcher Paper Co. long before the original hearing in the log case, and we object to it.

Mr. Clark: It does not appear it was definitely withdrawn. I think it is of no importance, particularly, whether it was or not. It is a part of the history of the litigation.

Mr. McNamara: It was specifically withdrawn, Mr. Gillett admits that. You will find that somewhere in the record. There is no doubt but that it was withdrawn and not only withdrawn, but the complaint of Gilchrist and the Island Mill Lumber Co. and the Richardson Lumber Co. was afterwards made to take the place of it.

Mr. Clark: Well, I think the evidence of its withdrawal is part of your case.

76 Mr. McNamara: I shall merely object to it, but I say it was withdrawn and never considered in any of the courts.

Mr. Clark: If that appears, I suppose the evidence should go out, but I am not satisfied.

The Court: It may be received. (Exhibit read.)

The defendant's answer to that petition appears here and will be read and marked as Exhibit 1 (D) (Exhibit read.)

The next document, marked Exhibit *i-e*, and which follows in chronological order after the filing of this petition just read, was the tariff which increased the Fletcher Paper Company's switching charge from two to five dollars a car. The date at which it took effect is mentioned in the Michigan reports, 171, page 339. I have not been able to find that tariff in the printed record, but I find a reference to it in your brief, Mr. McNamara, in the old case, on page 11, to which I will refer, as it gives the date and principal features of that tariff.

You say in the brief, "On the 3rd day of March, 1909, the Detroit and Mackinac Railway Company issued a local freight tariff, naming switching charges, etc., which increased the switching charge to Fletcher's Dam from two to five dollars."

As part of the history of this case I wish that noted at this point, so the different documents can come in the chronological order.

Mr. Henry: Is that the order you declare upon and set forth in the declaration

77 Mr. Clark: That is not an order; that is the increase by the Railroad Company.

Mr. Henry: You refer to it in your declaration; that is the one, is it?

Mr. Clark: That is the increase of switching charges from two to five dollars, which I no doubt refer to in my declaration; that is not an order of the Railroad Commission. We have not got to that yet.

The next document in point of time is the second complaint of the Fletcher Co., found on pages 9 to 11 of Exhibit 1, and will be referred to as Exhibit *i-f*. (Exhibit read.)

The answer of the railroad company to this complaint is found on pages 11 to 15 of exhibit 1, and is referred to as Exhibit *l-g*.

Mr. Baker: I don't see what you read those papers for; they are all in evidence, and I doubt whether the Judge can get any conception of the papers from your reading them that way.

Mr. Clark: Your Honor can tell me if I read too rapidly, so you cannot follow any of these things, because I want your Honor to get an idea of the history of this thing, otherwise you will be at a disadvantage. The great danger in such a litigation is to take it for granted that the court knows what he does not know, and I want to be sure that the Court has the foundation, the historical knowledge that you must have in order to decide the questions coming before you. I don't care anything about reading the answers of the railroad company to these petitions, but merely want to
78 show what is before the railroad commission. If counsel waives reading the answers, as I assume they will from Mr. Baker's objection—

Mr. Baker: If you insist on reading all those papers, read the answers.

Mr. Clark: At Mr. Baker's request then, I read Exhibit *l-g*. (Exhibit read.)

Attached to that is exhibit A, a letter from Fletcher to C. W. Luce, which is part of the answer, I suppose. (Exhibit read.)

The next document in point of time was the complaint of F. W. Gilchrist, Churchill Lumber Co., and the Island Mill Lumber Company, before the Commission, which is marked Exhibit *l-h* found on pages 18 to 20, of Exhibit 1.

(Exhibit read.)

There is a table there, that I do not think is necessary to read, giving a comparison.

The next document in point of time is the answer to the last mentioned petition, found on page 21 of exhibit 1, which will be marked *l-i*. (Exhibit read.)

We now come to the orders of the commission made on these petitions. The first order in point of time was that of October 19, 1909, found on pages 120-121, of Exhibit 1. Your Honor will remember that there were two complaints referring to Broadwell's dam, one was that for overcharge for switching cars, that is still in the case, the other was merely that they would not switch cars to that point when consigned to Alpena without an additional payment. Now, there may be something in our bill of particulars on that point; if so, it will come up in time and we do not waive
79 the right to read that complaint of April 24 later, if it appears material. At the present we will pass it, but this question of whether they should charge three and a half or five dollars for switching cars to Broadwell's dam is in the case, and that $1.50 makes quite a substantial sum.

The Court: That five dollar charge was collected all the time?

Mr. Clark: Collected for these five years, I think almost $6,000 of overcharges on that. This order is on pages 120-121 of Exhibit 1, and is marked Exhibit *l-j*.

Mr. Henry: As to that we will make objection that it is not based on any legal complaint, that no complaint was ever made according to the terms of the statute and therefore the order is absolutely void.

Mr. Clark: That objection is made in your plea; that will be a question of law.

Mr. McNamara: The further objection, I think, at this time, that these orders cannot be received here for the specific purpose of recovering in this proceeding, for the reason that they have elected their remedy under the common law and they cannot introduce here the orders of the Railroad Commission for the purpose of recovering, that they did not comply with the Railroad Commission act by applying to the Michigan Railroad Commission for reparation prior to the commencement of this suit; therefore these orders are incompetent and immaterial in this case that we have now before us.

Mr. Clark: These objections made are objections which
80 have already been argued extensively in the case before one court or another, and I believe that the court will get along better and that we will all get along better if we defer the argument on these objections until the main questions come up.

Mr. McNamara: Oh, yes, we will make it formally now, is all.

The Court: It may be received for the present.

Mr. Henry: One further objection, they are void because they were never filed with the commission on tariff rates provided for therein and never posted and published in accordance with law.

Mr. Clark: I understand the court is satisfied to record the objections on the record?

The Court: Yes, go ahead with the reading. (Exhibit read.)

Mr. Clark: The next order which I will offer to have marked is Exhibit 1-*k*, the order of October 22, 1909, which appears on pages 118 and 119 of the printed record.

Mr. Henry: We make the same objections to this order that were introduced to the other order.

The Court: It will so appear.

Mr. Henry: If necessary, we will spread the objection on the record.

81 Mr. Clark: As far as I am concerned, that may be waived.

Mr. Baker: I object to that order on the ground that there was no complaint to the Michigan Railroad Commission that the rates to Alpena on logs were unjust, unreasonable and excessive, and that there was no hearing on any such allegation before the Railroad Commission, no evidence was introduced to show that the rates to Alpena were unjust, unreasonable and excessive, the complaint in that case related exclusively to the discrimination in favor of shipments as against Alpena, and I insist that to sustain this order and grant the plaintiff any relief on this order would be a violation of the due process of law of the fourteenth amendment, and of the same clause in our own constitution. I also make the objection that the provision in this order for a fifty cent refund was an improper rebate and discrimination in favor of the Fletcher Paper Co., and is absolutely void in and of itself, a violation of the Michigan act.

Our position in regard to that is that all shippers living in Alpena are entitled to the same rate, regardless of what they do with their products.

The Court: It may be received for the present. (Exhibit read.)

Mr. Henry: Is that the one that cancels 205-M. R. C.?

Mr. Clark: Yes, that is practically what it is, M. R. C. 205 was the tariff complained of, M. R. C. 208 was the mileage tariff, and this I have just read was the tariff which practically applies the mileage tariff to Alpena, thereby cancelling 205.

82 Mr. Henry: Yes, it does not refer to it in number, and we could refer to it as M. R. C. 205 cancelled.

Mr. Clark: The next in point of time was the so-called supplemental order of November 3, 1909, found on pages 121-123 of Exhibit 1, and is now marked as Exhibit 1-*l*.

Mr. Henry: Same objection to that.

Mr. McNamara: Let it be understood that all objections we have made shall apply to each one of these orders.

The Court: That will so appear, Mr. Clark.

Mr. Clark: Yes, that is satisfactory. (Exhibit read.)

Mr. Henry: You admit that was made on the Commission's own initiative, no hearing ever had on the supplemental order?

Mr. Clark: I think you are right, if that has any importance in the case I would wish to investigate. My present impression is you are right. My understanding of it, without wishing to have the statement as evidence, minimum was inadvertent—I think your Honor is well enough acquainted with the lumber industry to know what I mean by minimum?

The Court: Yes.

Mr. Henry: That being the case, all of these orders, and this supplemental order being a supplemental order *i*t an order made on a hearing, and no hearing having been had on the supple-

83 mental order, we object to it for that reason in addition to the other objections.

Mr. Clark: In order to get into the record evidence of the date of service of these orders, the law providing they take effect from the date of service, we offer in evidence as Exhibit 1-*m*, paragraph 22 of the bill of complaint of the Detroit & Mackinac Railway Co. in the Circuit Court for the County of Wayne, in Chancery, which bill of complaint was signed and sworn to by James D. Hawks, Vice-President and General Manager of the Railway Company, and in which he states the date at which these orders were served on him. Instead of reading the whole paragraph, I will say that this paragraph, which appears on page 136 of Exhibit 1, states that the order of October 27, (which I assume to be a clerical error for 22nd, as there was no order of the 27th) was served November 1, 1909; that the supplemental order was served on the 6th of November, 1909, and that the order setting aside the five dollar per car switching charge—(the date being given as the 28th, which does not appear to be correct, but the order is here identified) was served on the 4th day of November, 1908—that should have been 1909. All I claim for that is the fact that the three orders were served on

those dates, the switching charge order on Nov. 4th, the original order in the log rate case, Nov. 1, and the supplemental order in the log rate case on November 6th.

Next in order is Exhibit 1-*n*, which I offer in evidence being the bill of complaint filed by the railroad company in the Wayne Circuit Court. That is the same bill from which I just read. That appears on pages 123 to 143 of the record, and I don't propose to read any of these pleadings in full.

84 I will say that I am willing to read this in full, if counsel desires, but until they indicate that desire, I will state generally just the subject-matter covered by this bill of complaint.

The bill of complaint first describes the complainant railroad company and its right of way, track and equipment, its history, the fact that its route runs through an unsettled district, the history of the logging and lumber business in Alpena and adjoining counties, the history of the so-called logging branches, how they were constructed, their cost, the fact, as alleged in paragraph 11, that there has been a steady increase in the expense of operation to the railroad company while their rates have not increased. Then it recites the issuance or promulgation of the tariff, M. R. C. 205, which is Exhibit 1-*a* in our case, the fact that this was prepared after taking into consideration the actual cost of shipment and the conditions at Alpena in regard to water shipments, etc., it then gives a statement as to the amount of lumber that has been reshipped by water by the Island Mill Lumber Co., Churchill Lumber Co., Richardson Lumber Co., and Gilchrist; it then recites the issuing of the mileage tariff being M. R. C. 208, and in our case Exhibit 1-*b*.

Mr. McNamara: If you will permit me to interrupt you, if the purpose that you announced in the beginning, if you are reading these things and calling them to the attention of the Court for the purpose of informing the Court as to the issues in this matter, why don't you read the bill of complaint. That tells exactly what the defense was.

Mr. Clark: I have no objection. I want the Court to get
85 in his mind as near as he can the past history of this case, and if he can get it by reading the bill of complaint I will be glad to read it.

Mr. Henry: The Court understands this is the bill of complaint that you refer to that was filed after the Railroad Commission had made these orders, filed by the Railroad Commission in the Wayne Circuit?

Mr. Clark: Yes, I will read from page 124 to page 142 inclusive. (Document read.)

Mr. McNamara: There is a letter written by Mr. Hawks attached to that. Read that letter.

Mr. Henry: The letter referred to as Exhibit C reads as follows: (Reads letter.)

Mr. Clark: I offer in evidence as Exhibit 1-*o*, the order to show cause issued by the Wayne Circuit Court found on page 123 of Exhibit 1. It is in the usual form and dated Nov. 20, 1909, and

orders the Michigan Railroad Commission to show cause, on the 24th of November, why a temporary injunction should not issue against said defendant as prayed for by the bill of complaint.

As Exhibit 1-*p* we offer the stipulation signed by Mr. McNamara for the complainant and Attorney General Bird, now a member of the Supreme Court, representing the Michigan Railroad Commission, a copy of the stipulation being found in defendant's plea, but it appears in the record on page 153.

(Paper read.)

86 The Court: Was the bill of complaint read by Mr. Henry, is that the one that Judge Murfin dismissed?

Mr. Clark: Yes.

Mr. Henry: That is also the one that went to the Supreme Court, reported in the 171 Mich., page 335.

Mr. Clark: That is the one in the Michigan state court as distinguished from the Federal Court.

Next in point of time were the intervention proceedings by which the Alpena shippers intervened in the case. First, is the petition of the Fletcher Paper Co. for leave to intervene, which I will not read, but we will have marked as exhibit 1-*q*. On pages 153 to 155 of Exhibit 1. The date of that was January 20th, 1910. That is the date of the verification of that petition. This record does not show when these documents were filed. There is no copy of the calendar entries, and nothing to show when these documents were filed. A similar petition of Frank W. Gilchrist, the Churchill Lumber Co. and the Island Mill Lumber Co., but the same date, Jan. 20, 1910, appears on page 156-157 of Exhibit 1, which will be offered as Exhibit 1-*r*, without reading. That is the same date, Jan. 20, 1910, the date of verification. I don't know when it was filed.

The order authorizing the intervention of these parties as intervening defendants was made on Feb. 3, 1910, and appears in the printed record Exhibit 1 on page 158, and is offered without reading as Exhibit 1-*s*.

The answer of the Michigan Railroad Commission to the bill of complaint is next offered as Exhibit 1-*t*, and found on

87 pages 161 to 170 inclusive, of Exhibit 1. Inasmuch as the bill of complaint has been read in full, I will read this answer in full.

(Paper read.)

We next offer as Exhibit 1-*u*, the answer of the Fletcher Paper Co. to the bill of complaint. That is found on pages 170 to 185 of Exhibit 1, and as Exhibit 1-*v* the answer of the defendant Gilchrist and other intervening defendants, found on pages 187 to 200, of Exhibit 1.

I think both answers cover, to some extent, the same ground, and while I am reading the answer of the Fletcher Paper Company, Mr. Thompson may follow me in the other, so when I come to read the second answer I will read only such parts as differ from the first answer. (Exhibits read.)

(Court here adjourned till tomorrow morning at 9 o'clock.)

Proceedings of September 20th, 1916.

Mr. Clark: We next offer in evidence as Exhibit 1-*w* the certificate of the Circuit Judge of Wayne County referring the case back to the Railroad Commission. This appears on page 768 of Exhibit 1. (Exhibit read.)

I might say to the Court that in passing the evidence without mention, I do not mean to except it from general offer of the entire record; I offered the entire record in the beginning, but I am offering separately the parts that are necessary to make a connected history of the case. The evidence appears between pages 230 and 769 of this record.

As Exhibit 1-*x* I offer in evidence the report or certificate of
88 the Railroad Commission following this re-submittal of the case to the Commission. This appears on pages 769-770 of the record, Exhibit 1.

Mr. Henry: If that order is based on the former order, we would like to have the objections made to this order that we made to the others.

The Court: It will be so understood. (Exhibit read.)

Mr. Clark: The next in point of time is the opinion of Judge Murfin, of the Circuit Court for Wayne county, which appears in Ex. 1, pages 771-785 inclusive. The date is not there shown, but on page 789 it shows that it was filed Jan. 21, 1911. This will be marked Exhibit 1-*y*.

I shall also make explanation of the theory upon which I am offering in evidence the opinions of the courts. I intend to offer not only this, but the opinion of the Supreme Court of Michigan and the Federal court, and all other courts that have passed on this issue. The reason is, I want to use these opinions for something more than their effect upon the law of the case; I want them in as part of the history of the case. In addition they bear particularly on the question of double damages, and I think the question of double damages is the only question in this case that is open. The manner in which this defendant has ignored these various opinions of the Courts I think has a bearing as a matter of proof in the case, in addition to the effect of the opinions as establishing the law of the case, and that is why I put them in the record as part of our proof.

Mr. Henry: You say, "As history of the case." You do not intend to use them for anything further than to enlighten the court as to the proceedings had and taken in the case?

89 Mr. Clark: I intend to use them on the legal argument as fixing the law of the case; but in addition, I am putting them in now as enlightenment to the court as to what this defendant has been doing during the five years during which time we ask to have it subjected to the payment of double damages.

Mr. Henry: Of course, that covers everything; and we object to it as incompetent and immaterial and not the best evidence of the facts they purport to show.

(Papers read.)

Mr. Clark: Next, exhibit 1-z, I offer in evidence the decree of the Wayne circuit court dismissing the bill and affirming the orders of

the railroad commission. This was dated February 11, 1911, and appears on pages 791-2 of Exhibit 1.

I will say in passing that there was a motion for a rehearing, but it did not seem to be an essential part of the history of the case, although I haven't any objection to having it in the record, if counsel want. I want it considered as in, I have offered it and it is in with my offer of the entire record, everything in this record has been offered by me, but I am merely omitting to read or refer to it in this history of the case.

Mr. Henry: That there may be no misunderstanding, have you got the stipulation relative to the admission of this record in evidence?

Mr. Clark: Yes.

The Court: Why wouldn't it be a good plan to read that in?

90 Mr. Clark: Do you want that motion for a re-hearing in?

Mr. McNamara: We will put it in, if you don't, so it don't make any difference.

Mr. Baker: It is in there, just what Judge Murfin said. He said he wouldn't listen to it.

(Stipulation read.)

Mr. Clark: I will put in the motion as 1-*aa*, and I will include in Exhibit 1-*aa* the statement made by Mr. Baker, and the court, in regard to this motion on pages 789-90 of the record.

(Papers read.)

Mr. Clark: The decree which I have already marked as 1-*z* is as follows (reads):

As Exhibit 7 I offer in evidence the opinion of the Michigan supreme court in the case which is reported in 171 Mich. 335. I wish to read that now.

(Intermission.)

Mr. Clark: We offer in evidence as Exhibit 8, under the stipulation, a copy of the printed record in the supreme court of the United States, in the case which was finally decided in the opinion reported in 235 U. S. 402. I will read certain extracts from this later on, as I did from Exhibit 1.

The first is the decree of the Michigan supreme court, following the opinion, which I have already read, and appearing on page 51 of this record. That is marked Exhibit 8-*a*. It shows that the opinion was followed by a decree in the usual form.

91 Next is Exhibit 8-*b*, the bill of complaint filed by the D. & M. Ry. Co. in the district court of the United States for the eastern district of Michigan, southern division, in equity. This is on pages 1 to 15 and follows closely the other bill of complaint.

The Court: That follows the same wording of the bill of complaint filed in the Wayne circuit court?

Mr. Clark: No, not the same wording; but sets up substantially the same fact and asks substantially the same relief. There are some differences. It is filed several years later and brings the controversy up to date. It should be probably offered by Mr. McNamara.

Mr. McNamara: Well, I don't care; you might as well read it.

Mr. Clark: I will, omitting some tables.

(Paper read.)

Mr. Clark: Next, as Exhibit 8-*c*, is the demurrer of the Churchill Lumber Company, Fletcher Paper Co., Gilchrist and the Island Mill Lumber Co., to this bill of complaint, on pages 22 and 23 of Exhibit 8.

As Exhibit 8-*d* I offer in evidence, without reading, the demurrer of the Michigan Railroad Commission, on pages 23-24 of Exhibit 8. That was filed September 27, 1912. The grounds stated in this demurrer are substantially the same as in the other.

I also offer in evidence Exh*bi*it 8-*e*, the objections of the Fletcher Paper Company et al., defendants, to the application for preliminary injunction, found on pages 25-26. The objections themselves
92 and the affidavits and exhibits which were attached to these objections, a number of pages following that.

Also as Exhibit 8-*f*, I offer, without reading, the answer of the Michigan Railroad Commission on the application for an injunction, pages 54-55. The grounds there are substantially the same.

A- Exhibit 8-*g* I offer the opinion of the United States district court, Vol. 203, Federal 864, and I will read from the record of the supreme court of the United States where it appears on pages 56-64 inclusive. This was decided before two circuit judges and Judge Tuttle, district judge. (Papers read.)

We next offer as Exhibit 8-*h* the order of the district court of the United States, denying the motion for the preliminary injunction, which is dated March 22, 1913, found on page 65 of Exhibit 8, without reading.

We offer, without reading, the briefs filed by the various counsel in the appeal from this order to the supreme court of the United States. That was the case which was reported in 235 U. S. 402. These briefs are offered as part of the history of the case.

As Exhibit 9 we offer the motion to dismiss or affirm or transfer to the summary docket. These are all in under my blanket offer.

The motion to dismiss the bill of the Michigan Railroad Commission is on page 68 of Exhibit 8.

Mr. McNamara: That is the motion to dismiss our bill?

Mr. Clark: Yes; and is marked Exhibit 8-*i*. And the motion to dismiss made by the Fletcher Paper Co. and others, all of the shippers, is on pages 70 and 71 of Exhibit 8, and is marked Exhibit 8-*j*.

The remainder of the record is given up to the documents
93 connected with the appeal. I do not think they are necessary in giving this history.

Now, coming back again to the briefs, the motion and brief combined has been marked Exhibit 9; the brief for appellant D. & M. Ry. Co., in opposition to the motion, is marked Exhibit 10; the main brief for appellant, D. & M. Ry. Co., on the main hearing of the case, is Exhibit 11; the brief for appellees is Exhibit 12, and the supplemental brief for appellant, Exhibit 13.

Next, in point of time, was the decision of the Michigan supreme court in the mandamus case in 182 Mich. 234. That decision was made before the United States supreme court decided the cases before it. We offer that opinion in evidence as Exhibit 14. (Exhibit read.)

(Recess until 2 p. m.)

Afternoon Session.

Mr. Clark: We next offer the record and briefs in the supreme court in the mandamus litigation which we have already referred to, which was reported in 182 Mich. 234. This will be offered without reading. The record will be Exhibit 15, a brief by relators Exhibit 16, brief for respondent, Exhibit 17, reply brief for relators Exhibit 18, reply brief for respondent, Exhibit 19. The brief of the attorney general is Exhibit 20.

The next in point of time was the opinion of the United States supreme court reported in the 235 U. S. page 402. We offer that as Exhibit 21. To save the bringing of that book here I have the official copy of that opinion certified by the clerk of the United States supreme court. (Exhibit 21 read.)

Following that I wish to have the record show that on December 28, 1914, the district court of the United States for the eastern district of Michigan, southern division, in equity, entered a decree dismissing this bill of complaint. This is stipulated to in one of our stipulations—one of the formal facts to be conceded without proof. On December 28, 1914, the U. S. district court entered its decree dismissing the bill of complaint of the Detroit & Mackinac Railway Co. in the last mentioned case. That was made to save the necessity for a certified copy of that decree. It did not appear in the printed record.

94

The next is the opinion of the supreme court of Michigan in the contempt proceedings found in 184 Mich. 242. This was decided February 4, 1915. We will consider the decree of the district court as Exhibit 22, and consider this as Exhibit 23, even though the exhibit is not produced and marked. (Exhibit read.)

We offer without reading, the record and briefs in the case just read, the record will be offered as Exhibit 24, the brief for relators as Exhibit 25; Exhibit 26, brief and answer of the respondent.

As Exhibit 27 we offer the opinion of the supreme court of Michigan in the case reported in 185 Mich. 649, which were proceedings to impose a penalty upon the Railroad Company for noncompliance with the injunction. This opinion was filed in April, 1915, which was after the issuance of the now tariff, so that I should have offered the tariff in evidence first, but as this tariff — the last exhibit to be offered, I will leave these numbers as they are.

(Exhibit 27 read.)

I will offer the records and briefs in that case; the record as Exhibit 28, or rather the printed motion to impose a penalty on respondent in the contempt proceedings, with the brief incorporated in it, and as Exhibit 29 we offer the brief of the relator, Michigan Railroad Commission, and as Exhibit 30 the answer of the respondent to the relator's motion; and as Exhibit 31, the Railroad Company's motion to modify the opinion and for further directions; and as Exhibit 32 the brief for respondent in support of their motion; and as Exhibit 33 the brief of the relator's

95

in opposition to the respondent's motion, and as Exhibit 34 the affidavit on behalf of the relators.

As completing our proof of the facts in chronological order we wish the record to show that on February 18, 1915, the so-called new tariff was issued and given effect as set forth in the plaintiff's declaration and as stated in the opinion of the supreme court, which I read. This is covered in one of our stipulations, so it is unnecessary to produce or prove a copy of that.

That closes our case with reference to the evidence which applies generally to all the defendants. Do I understand that we now proceed with our evidence in the separate cases, or you first proceed with your evidence that applies generally?

Mr. McNamara: No, I think you better put in your case.

Mr. Henry: You did not read to the court Judge Mandell's order that under the bill of complaint cause might be shown why an injunction should not issue.

Mr. Clark: I offered that and read it, I think.

Mr. Henry: You offered it, but did not read it.

96 Mr. Clark: I had it marked as one of our exhibits.

ALLAN M. FLETCHER, sworn for plaintiff, testified as follows:

Examined by Mr. Clark:

Mr. Clark: We will have the articles of association of the Fletcher Paper Company marked Exhibit 39. These articles are dated May 19, 1898; capital stock, $200,000; the purpose to engage in the manufacture and sale of paper, pulp wood, sulphite and other like products, and the stockholders are George N. Fletcher of Detroit, Michigan; Frank W. Fletcher of Alpena, Michigan; Allan M. Fletcher of Detroit, Michigan; Grace Fletcher of Detroit and Winthrop F. Victor of Alpena.

George N. Fletcher was my father, and is now dead. Winthrop F. Victor was treasurer and is now dead.

Q. I show you one of your expense bills used in making up the bill of particulars which we will have marked Exhibit 40, and ask you whose handwriting the name "Fletcher Paper Company" is in?

A. Mr. Victor's.

I remember a consultation in the office at the time the rate was announced by the commission. The first time I heard of it after receiving logs we instructed Mr. Victor to make a tender in cash on the basis of the new rates. I was not present when Mr. Victor made the tender. He attended to all freight matters at that time.

Mr. Clark: We offer in evidence expense bill Exhibit 40 for the purpose of showing the endorsement signed "Fletcher Paper Company" in the handwriting of Mr. Victor. It is on one of the ordinary expense bills dated November 17, 1909, as follows:

97 "Paid under protest after tender of $3.50, being rate as established by Michigan Railroad Commission, was refused. Fletcher Paper Company."

Q. I call your attention to the fact that your other expense bills are all stamped, some of them with the words "paid under pro-

test," with the written signature, "Fletcher Paper Company," and the others, "paid under protest on account of excessive charges; Fletcher Paper Company, by W. F. Victor, treasurer." What do you know, personally, if anything, about the stamp on those bills?

A. I presume this "paid under protest" had to be signed by somebody individually over there, and I imagine Mr. Victor had that stamp made to simplify matters. Mr. Victor had the stamp made and kept it in the pigeon-hole where we usually got our freight bills.

Mr. Clark: We offer in evidence these expense bills in bulk merely to show that all of the expense bills since the date we claim are marked in either one of these three ways.

Mr. McNamara: I object to that as incompetent and immaterial and I also make a motion in order to get the matter squarely on record that the testimony of Mr. Fletcher with reference to a tender being made be stricken out as he knows nothing about it of his own knowledge at all.

The Court: And what do you say to that, Mr. Clark?

Mr. Clark: An entry made in the usual course of business by a witness deceased is competent. We think these are com-
98 petent on that theory and also on the theory that these are the receipts of the railway company. They are the receipts they gave for the payment of freight, and if this stamp was on them it amounted to the same thing no matter by whom it was put on.

Mr. McNamara: If it was put on them at their office any time they wanted without reference to the railroad company I should think it would make a lot of difference. It would be manufacturing testimony for themselves without the knowledge of the railroad company.

Mr. Clark: We of course are under serious disadvantage on account of the gentleman's death. These notices were stamped on the expense bills in the railroad company's own office and with the knowledge of the railroad company's employes that we paid those bills with that proviso on there, and that we paid under protest, they knew it at the time.

Mr. Clark: We offer in evidence the bill of particulars in the Fletcher Paper Company case as Exhibit 41, and with it we offer Exhibit 42, the stipulation in the Fletcher Paper Company case referring to the bill of particulars. In the Fletcher Paper Company case the bill of particulars had been filed before the stipulation was made, therefore the stipulation had to be filed separately from the bill of particulars, and separate reference had to be made. In the other cases, the bill of particulars were first made out and served before filing and the stipulations were attached to them when they were filed thereafter.

Mr. Clark: We now offer in evidence some depositions taken in the Fletcher Paper Co. case at Alpena on August 22, 1916.
99 I don't know as it is necessary to offer them in evidence, but I will do so. They are filed in the case. Three deposi-

tions will be offered under the one Exhibit Number 43. They were taken on October 22; the signatures of the witnesses are waived.

The Deposition of Henry E. Fletcher, Taken at the City of Alpena, Michigan, August 22, 1916.

HENRY E. FLETCHER, being sworn for plaintiff, testified as follows:

Examined by Mr. Clark:

My age is 32, my residence Alpena, and my position that of general manager of the Fletcher Paper Company which position I have been holding since January 1910. From 1907 to 1910 I held various positions on the way of working up through the mills. The nature of the business of the Fletcher Paper Company is manufacturing wrapping paper and fibre specialties from various kinds of wood along with other ingredients and chemicals that go into the manufacture of paper. The wood comes in the form of pulp wood and logs. The majority of the logs are hemlock, then there is spruce, balsam and tamarack. The majority of the logs are shipped to the mill by train over the Detroit & Mackinac Railroad. Some pulp wood is driven down the streams into the main river and then driven by streams to our mills. Then the rest, a small proportion of it, is brought in in the winter on sleighs by farmers in the immediate neighborhood. There is a very small proportion of the manufactured product that isn't shipped out by the D. & M. There is a small proportion shipped out by boat.

Q. During the years that you have been connected with the company—say from the year 1909, what has been done in the way of keeping records for the purpose of computing costs and eliminating expenses?

100

A. We certainly since 1909 and 1910 have kept very close tab—I mean as far as carrying it down through approved facilities. Before that time the records in and out have always been kept; but since 1912 it has been kept a great deal closer than ever before.

Systematic records have been kept under my own immediate supervision as to the years 1908 and 1909.

Q. What can you say, Mr. Fletcher, as to whether you have made a study of the subject sufficiently to enable you to state, approximately, the amount of paper which is manufactured from a thousand feet of logs, board measure, or as they are scaled by the railroad company?

Mr. Henry: Is it agreeable that we need not make objections to the testimony here, and that on the trial we can then make our objection and get a ruling upon it?

Mr. Clark. Well, so far as the objection goes to the form of taking the testimony, yes; but so far as it might go to the competency of the testimony which would necessitate supplementing

it by other testimony if the objection were sustained, I should say no, because in that case we want to be advised in advance of any objection of that nature. We wish to have our proofs complete, and if there are any objection-, we want to know it now.

Mr. Henry: We object to that as incompetent and immaterial.

(Question read to witness.)

A. Do you mean what are my qualifications for passing judgment upon the subject?

Q. Yes; and what study you have made of it?

101 A. Graduated from the University as chemical engineer, specializing on paper making. At the present time I am acting as chairman of the Technical Association of the Pulp and Paper Industry, which comprises all the chemists, engineers and operators in the United States, and a good part of Canada. I just finished service on a committee from the wrapping paper mills of the United States, perfecting a system of cost accounting.

Q. I show you a printed pamphlet issued by the Technical Association of the Pulp and Paper Industry for 1916-17, giving the officers of the committees etc., which names Henry E. Fletcher as Chairman of the Association and also as Chairman of the Executive Committee.

Is that Henry E. Fletcher yourself?

A. Yes sir.

Mr. Clark: We offer the pamphlet in evidence.

(Same marked Exhibit 1.)

Witness: Yes sir, and also I serve on the Executive Council of the American Paper and Pulp Association.

Mr. Henry: We object to the pamphlet going in. The thing we supposed you had was a record of the amount that was made from timber shipped in; and we insist that that record would be the best evidence and that this pamphlet—a printed pamphlet—would be secondary evidence and would not be competent.

Witness: I understand he just wanted evidence of my qualification and capability of judging—

Mr. Clark (interrupting): The pamphlet has nothing to do with the record we are showing. It merely contains the evidence of Mr. Henry E. Fletcher's holding the offices which he mentions.

Q. We will read in the record all of this exhibit which 102 we care to have in the evidence:—That is the fact that it is issued by the Technical Association of the Pulp and Paper Industry, giving the officers and committees for 1916 and 1917, which include gentlemen from Michigan, Wisconsin, New York, Pennsylvania. Gives the name Henry E. Fletcher, Alpena, Mich., as Chairman of the Technical Association of the Pulp and Paper Industry, and as Chairman of the Executive Committee.

Mr. Henry: You do not offer the contents of the pamphlet then, as substantive proof?

Mr. Clark: No. Other than that, we have no purpose to serve by this exhibit.

Q. What can you say as to whether there is a percentage of variation in the product of one thousand feet of logs, in paper, depending upon differences of quality or differences in condition of the log?

A. There is a great variation in percentage—quality of the wood—on the production that you would get from it. This subject has been taken up very exhaustively. It is now in charge of the committee. Dean E. H. Baker of the State Forestry School of Syracuse, N. Y., and who is with me on that committee—the largest handlers of wood and pulp in the world.

Q. Now what is the nature of the records that you have been keeping, from which this information can be obtained.

A. We keep a record, which I have here before me, and it has been kept accurately since 1909, of every pound of wood production from the digesters, that have been cooked in this plant. It is carried right out to the pound, of every kind—all of our woods—
the various kinds of woods are separated and kept after that;
103 and there is a complete record, which checks with the shipments of the finished product of every bit of wood since 1909.

Q. Then I understand this record you are referring to is not made for the purpose of this case?

A. No sir. It is made for the scientific management of the plant.

Q. It is made for the purpose of elimination of waste?

A. Yes sir.

Q. Will you produce for the inspection of counsel for the defendant this record which you speak of; and also any other supplementary records which may be needed to understand it, and we will consider them all offered in evidence.

Mr. Henry: We make a general objection to them as secondary, and immaterial and incompetent.

Mr. Clark: Do you wish them marked separately, or do you wish to save time by just marking them in bulk as one exhibit? They are here subject to your inspection.

Mr. Henry: If they are all here subject to our inspection, all you wish to use, we have no objection to your offering them in bulk.

Mr. Clark: In view of the conditions under which these depositions are taken, I will assume the right to offer these in bulk, to shorten the time of the examination; and I assume that in matters of that kind you will cooperate with me in shortening the time required?

Mr. Henry: Oh, certainly.

(The witness here produces a book.)

104 A. It is Fibre Mill Record Book.

Q. And you can give the name of the other books.

A. That takes the finish- product of the sulphite mill.

Q. You are only working along the logs——

A. Logs.
Q. And not the pulpwood?
A. Or, do you want——
Q. (Interrupting.) Well, then, besides that, the record of ground wood mill, the pulp mill wants to be put in too?
A. Yes.

Mr. McNamara: I understand it is to be introduced in evidence—the entire book—to be used—certain portions you want to use out of it?

Mr. Clark: No; the purpose is merely to show the basis of the witness's statement. The witness will make a definite statement, epitomizing the contents of these books. The books are merely offered because of the rule that permits a witness to epitomize or summarize the contents of voluminous records and also requires that the records themselves be at the same time produced for inspection of opposing counsel if desired. We do not propose to read anything from these books into the record.

Mr. McNamara: As I understand it, they are supposed to be used generally on the trial?

Mr. Clark: No, don't think we will use them at all. I will follow this up, before we go into them.

Q. Mr. Fletcher, state from your general knowledge of the business and also from such information as is contained in this record and all the records which might have been kept by you, how
105 many pounds of paper will be produced at your mill and have been produced during the years 1909 to 1914 inclusive, from one thousand feet of logs and pulpwood, giving the maximum and minimum amount?
A. From 1700 as a minimum, to 1900 as a maximum, will be the production of sulphite pulp pounds to one thousand feet of logs.
Q. How does that work out in finished product?
A. Well, from finished product there is a very little loss, and most always a gain, because when there is a certain loss of fibre when it comes to the paper mill there naturally would be the addition of clay, rosin and other materials that go in with the lot, making up any weight—any loss of weight from the fibre.
Do I make myself clear?
Q. Then what is the maximum and minimum finished products from one thousand feet of logs?
A. From 1700 to 1900 pounds would be very fair—very close.
That variation is caused on the different classes of wood.
Q. Now what can you say as to whether that statement may apply during all the years from 1909 to 1914 inclusive?
A. I think it will, because we have been operating through practically the same tracts of timber during those years.
Q. How to give the railroad company——
Mr. Henry (interrupting): There is one thing I don't understand: He says, on that, from 1700 to 1900 pounds of sulphite pulp to the thousand?

106 Witness: Yes, sir.

Mr. Henry: Then he says the same for finished product.

Witness: I mean this: To prepare sulphite pulp and then make it into paper. The sulphite pulp is the first step from the logs. To make that into finished paper there is supposed to be a certain amount of loss; going through the paper mill, in the usua- operation that loss is made up in the paper mill, because in different sheets, we will add amounts of clay to get the finish, or we will add amounts of sizing which is made up of rosin and other things—dyes and everything else that goes with it, which adds to the weight of the paper; and that weight practically makes up for any loss of fibres. It is very close.

Q. So that the pulp and paper are practically pound for pound?

A. They may run a little variation, but for all practical purposes there is very little loss.

Q. If we allow in our computation of shipments 1900 pounds for one thousand feet of logs, the maximum as you stated, we are giving the railroad company the benefit of every doubt?

A. We are giving them the benefit of every doubt all right.

Q. And that would be covering the six years in question?

A. That amount of ground wood we will get a higher percentage from the ground wood than we will from sulphite—even higher than the 1900. I was speaking of sulphite when I made that statement, taking the average of 1900 pounds to 1000 feet.

107 Q. Taking an average of 1900 pounds to 1000 feet of logs shipped over the railroad, are we giving the railroad company the benefit of every doubt?

A. Yes, sir.

Q. Is that true of the entire period?

A. Yes, sir, because in the first years we were not running as efficiently as now. We had more losses going out. We were not getting as much finished paper; and 1900 pounds will give them more of a benefit in the first period than the last.

Mr. Clark: To make my theory plain, so that you will understand: That is our proof on this question— These are produced, these books, under the rule which permits the witness to state the contents of voluminous records. The records are produced for the inspection of counsel fo- use at the trial. We therefore produce those before you and they will be here and will be subject to inspection between now and the time of the trial, if you wish. And as I understand, under these circumstances, in view of our not desiring the entire books, it will not be necessary to take any of them——

Mr. Henry: It will be satisfactory if you identify the books.

Mr. Clark: That is what I meant by naming the sulphite book, pulp record book and also the wood record. And under the general understanding with the counsel, the swearing of the individual bookkeepers who made entries in these books from time — time during the six years, is waived, gentlemen?

Mr. Henry: Well, we would concede that the bookkeepers would

testify to the accuracy of their entries; but not conceding
108 the admissibility or the competency of the instruments.

Mr. Clark: But they are as admissible as they would be if we produced the person in each case who made the entries and entered upon the record the fact that he accurately made them?

Mr. Henry: Yes, that is right, Mr. Clark.

Witness: I haven't got right down to the absolute pound in that statement, but I can figure it out for you at any time.

Q. Now have you named all the books that the gentlemen would need if they wish to investigate that computation?

A. I think so.

My testimony is based partly or to a large extent upon general information acquired at different times as manager of the business. I am giving a pretty general statement. It is not sworn to and they are not bookkeeper's statements, but this is all right there, and we can verify it. If I remember right we took a year that we were in an exceptionally bad piece of wood and figured it out from that year when our production was very low, and got the 1700; and if I remember right we took another year when we were working off all the hemlock which was in the 1912 record I think, and took hemlock which came down the river which was good solid, green hemlock, and I think I got the 1900 from that.

Q. Your testimony, I am asking now, is based upon your knowledge obtained not only from these books, but from your general experience as a manufacturer of paper and as superintendent
109 of the mill and office, and I wish you to state positively or not at all, in giving the minimum and maximum.

Mr. Henry: In regard to that question, if you have a record of the amounts, we insist that that record would be the best evidence, and his judgment based upon his qualification would be secondary and not the best evidence. Now he has got a record of what was shipped in and the amount of paper produced from it, and that would be the best evidence; and I should object to any testimony based upon anything but the figures.

Mr. Clark: If there is such a record it is the best record. The records do not explain themselves; the records need elucidation and summarizing, what the witness has done, and we are asking for the summarizing of that record; and we are asking for his general knowledge and as superintendent of the plant.

A. Why, from a general knowledge of the whole situation I would testify that the maximum of 1900 pounds and the minimum of 1700 pounds of sulphite produced from a thousand feet of hemlock is correct.

Q. Can you make up a complete and accurate statement from each one of these years?

A. Why, I think I can. It will take some time to do it. I have got to get back through all the books in those other years and bring it up.

Mr. Clark: If the gentlemen wish that on cross examination, you can have it; but I am satisfied with what the witness has stated.

Witness: If you are taking the basis of 1900 pounds you are getting more than I will show up if I make an accurate determination.

110 Mr. Clark: We are satisfied with the witness' knowledge on that fact.

A man cannot act as superintendent of a paper mill for six or eight years and make records of all of it without knowing what it will show—how many pounds of paper would be manufactured from one thousand feet of logs. The entries are only corroborative of the witness' knowledge. We offer the books and you can cross-examine on them.

Mr. Henry: Will Henry E. Fletcher be present on the trial of the cause?

Mr. Clark: No, I don't think he will. That is my object in taking his testimony here. I will say, however, that if you wish him to make out an estimate and attach it to his statement, he will do so.

Mr. Henry: We are simply asking an opportunity to see the best evidence you have got; and the record would be the best evidence.

Mr. Clark: I don't think so, because the record don't show the figures.

Witness: The figures you want are not carried in our records.

Mr. Clark: If the witness knows the facts from his experience in that mill and seeing the paper coming out and shipped out from year to year, he knows the facts, and he doesn't know them any better from calculation of a record.

111 Cross-examination.

By Mr. Henry:

Since and including the year 1909 I don't think there was any one connected with the Fletcher Paper Company that has any more knowledge of these facts than I. I think by going through the records, we can show the respective amounts of timber that was manufactured into paper from that which was brought in by rail and that which came in in other ways, so that we can distinguish between the two.

Q. Is it a fact that you have been getting timber by rail and selling it to other dealers here and taking other timber and manufacturing it into paper? By that I mean have you had logs come in by rail that you have sold to the Island Mill, or to any one else?

A. We have at times made an exchange of logs. If I remember correctly that exchange was a receipt of railroad logs and they were paid for in river logs. That exchange was a matter of our own. We were shy, and I think the Railroad Company had something to do with it. We cannot use inferior fibre, but we can use timber that would be considered inferior sawlog timber. If it was rotten timber or anything; shaky timber; anything like that, then we would not get the grade of fibre, while in a crooked stick that was sound, we would get good fibre out of it. I can furnish a statement

for the years 1909 to 1915 inclusive, showing the amount of timber which we manufactured into paper, which came in over rail, also the amount during those years which came in by water and by sleighs.

Q. And can you furnish also the amount of timber which came in by rail, showing that that identical timber which came
112 in by rail was not manufactured into paper?

A. Well now, I couldn't swear to that. I would have to go through the books to see.

Mr. Henry: Now, Mr. Clark, to shorten up matters we would like Mr. Fletcher to make a statement if he can, showing this: the quantity of timber that came in by rail each year for these respective years that I have designated; the amount that they manufactured into paper in these respective years, which came in in any other way; and the amount of timber which came in by rail which was not manufactured into paper; the identical timber that came in by rail that was not manufactured into paper.

Mr. Clark: I have no objection to that, and would ask the witness to attach it to his disposition.

Witness: I think we can do that.

Q. Now, with that your testimony has crystal-ized around this feature: that one thousand feet of timber will produce from 1700 to 1900 pounds of sulphite pulp; approximately 1700 to 1900 pounds of finished paper?

A. Yes, sir.

Q. We want a verification of that statement, and what we want is: what amount of timber during those years actually went into the making of that pulp and that paper, and how it came in?

A. If it can be made I will get it.

Mr. Henry: In the event of Mr. Fletcher's inability to produce this statement we would like either the books from which he makes this statement or we would object to the testimony as not the best evidence.

113 Mr. Clark: The books are at your service from now until the time of the trial, at this office.

Mr. Henry: Well, will they be produced on the trial?

Mr. Clark: If you wish them; but we would expect you to give us special notice at that time if you want them.

Witness: The three books are the Sulphite Mill Record Book, the Pulp Mill Record Book and what we call our Wood Journal, and I might have put in the Paper Mill Record Book to get the finished product.

Q. Now, have you any books of account showing, or which would aid in determining the amount of timber that came in and the amount of pulp that went out, and from what woods the finished product was made?

A. I think that will be covered in these books.

Mr. Clark: I now offer in evidence all the books that have been

mentioned, but will ask counsel to notify us prior to the trial if they wish us to produce them in court. Unless so notified we will assume that they will not be required in Bay City.

Mr. Henry: We do not want you to do any more work in connection with this than is necessary, and if we can concede anything that will be of help to you so that you will not have to spend a lot of time on matters that are not in dispute, we will be glad to do so; but in addition to that we would like to have you make a statement of the various years from 1909 to 1914 inclusive, showing the shipments of paper during each year, how shipped, what was shipped as an interstate shipment or was interstate—what was shipped out of the state, and what was shipped here to some party in the state.

114

A. That would be an endless task. We ship so much in single rolls.

Mr. Clark: All the rail shipments you will find from your records, Mr. Henry.

Q. Did you obtain logs from the D. & M. road which were manufactured into lumber and sold here in the city?

A. No, sir; what little we have been manufacturing into lumber is simply used in putting in concrete forms. We just simply cut it into lumber, use it for concrete forms, tear it down and put it through the mill into paper.

Q. What would be the difference in your minimum and maximum (1700 and 1900) between a good class of straight hemlock logs and a poor class consisting of limbs and knots?

A. I think you have approximately got them, 1700 would be the poor and 1900 would be the good.

At this point in the reading of the deposition the following occurred:

Mr. Henry: We would insist it is a part of your case to show that logs were shipped in over the D. & M. tracks and what, of those identical logs, were made into paper and the finished product shipped out.

Mr. Clark: We insist it is not a part of our case. We will show how many thousand feet were shipped in by rail and how many pounds were shipped out by rail, but we will make no effort to identify the individual logs.

At this point in the reading of the deposition the following occurred:

115

Mr. Henry: We move the testimony be stricken out. It is our theory that they have got to show that the identical logs that came in by rail were made into paper, and that they have to show what quantity of logs came in by rail went out over the D. & M. road. We object to the testimony of Harry Fletcher when he puts his experience against the records. They could show, and I think they ought to, the exact amount of logs that came in by rail and also the exact amount that came in by rail that was manufactured into paper went out by the D. & M. Railroad.

Mr. Clark: The additional examination of this witness and the schedules he attaches to his deposition go a long way in answering the objection made, and I therefore ask that the deposition be completed.

Mr. Henry: I will waive it until then.

The reading of the deposition was then continued as follows:

Mr. Clark: I will say it is impossible to show the identical log that came in by rail and show it was that identical log that went into paper that went out by rail or water.

Mr. Henry: We would like a record of the boat shipments and those sold in any other way.

Mr. Clark: If this were not an almost impossible task we would give it to you. We have no idea or intention of trying to prove the destination of each individual log there. It cannot be done and we do not propose to do it.

116 Witness: In the process of manufacture here from one end of the mill until the paper comes out the other end of the mill, there are some one hundred to two hundred thousand feet of logs in there all the time. Now you couldn't tell which log came by rail or by water, or which log went in this colored sheet or that colored sheet. It is impossible.

Mr. Clark: We will make, and Mr. Fletcher will add to his statement all local sales which did not go out by the D. & M. Railway Company or the Detroit & Cleveland Navigation Company.

Mr. McNamara: What is the objection to giving us a statement of the out-shipments of paper over the boat lines?

Mr. Clark: We can give you the totals; but to give you the details, we cannot. We will give you the totals for each of those years and we are prepared to give you now the total in and out shipments by rail.

Mr. Henry: We do not want it to appear that we have waived anything; therefore at the conclusion of Mr. Fletcher's testimony we move to strike out all testimony relative to quantities based upon his judgment or upon his experience, on the ground that the records should show and we insist upon their being produced to show the exact amount, and not based upon Mr. Fletcher's judgment. And with that we will leave the matter.

Mr. Clark: To make our testimony clear, I will say: His testimony is not based upon his judgment. It is based upon his knowledge. He has made these records as they have been made;

117 he therefore knows what they contain, and the making of these records themselves is one of the acts which have given him the knowledge; and the records are offered as one of the elements in the acquisition of this knowledge. The records themselves do not show the figures. If they did, we would read them into the record. Such figures *as* are in these records would be meaningless when read into the record. They merely furnish material from which an expert like Mr. Fletcher reaches conclusions of fact, and he has reached these conclusions of fact and has stated his knowledge

of the facts, and not a mere expression of judgment. If you wish to cross examine further to ascertain these facts, you may do so.

Mr. Henry: Can you find from your records the amount of logs shipped in by rail and the amount of paper which was shipped out from those identical logs during these several years? Do they show that?

A. No, it won't show. The mill is fed by rail logs and river logs at the same time. Also possibly from the reserve pile in the yard, and it goes through the digester altogether with 300 gallons of water to the pound, and comes out in paper.

Q. From the record books here the court, the judge, or jury, or the ordinary layman could not determine the figures which you have testified to, that one thousand feet of logs would make?

A. I don't think they could. I think that any man who was holding a corresponding position to mine, though, could very readily.

Q. I understand you to say from any records you have, it would be impossible to show the amount of paper that was actually manufactured out of logs shipped in over the defendant's railway?

118 That you could not take your books and figure out the amount of paper that was manufactured for each of those several years, out of logs which have been shipped in over the defendant railroad?

A. From the individual logs, no.

Mr. Clark: If that is so, do you wish the statement?

Mr. Henry: We want all the information that Mr. Fletcher can produce that will enlighten us upon the subject matter of your direct examination.

Redirect examination.

By Mr. Clark:

Q. Taking your shipments which are referred to in the bill of particulars and for which the fifty cent refund or rebate is sought, is your statement that 1,900 pounds is the outside limit of manufactured paper from each thousand feet of logs a statement of your judgment or your knowledge?

A. Why, a statement of my general knowledge, and being associated with all these facts.

After the reading of the foregoing deposition the following occurred:

Mr. Clark: I will explain the schedule attached to the deposition. On the left hand we have the totals for the six years as shown by the explanation under each line, and on the right hand page those totals are separated into annual totals, so the explanation of the line

119 should be carried on through, the only difference being that on the right hand page they are annual amounts and on the left hand page they are the combinations of the annual amounts, so this shows first the hemlock logs received over the railroad, hemlock logs received by river from Churchill Lumber Company, and all other items giving as far as the witness could the in-

formation requested by Mr. Henry. The witness makes various notes. The objection of Mr. Henry is that it is impossible to trace any particular logs or classes of logs into the products as manufactured or shipped out. The witness changes his seventeen hundred to the nineteen hundred pound estimate into the actual amount and figures up each year and the total is 1,834 pounds, which bears out his statement that 1,900 was the maximum. Then he applies the actual instead of the estimated amount each year into a certain schedule, which comes in the testimony of another witness hereafter referred to.

Mr. McNamara: That means the total for the year.

The Court: All this went through the pulp mill?

Mr. Clark: For six years; 700,000 were sawed into lumber. That is the only exception. That goes to the pulp mill together with a large amount of other logs that never came there at all. Another witness testifies to that.

My answer to the objection of Mr. Henry is that so far as the record being the best evidence is concerned, I do not even admit that because the question was one in regard to which the witness's general knowledge as manager of the paper mill was as good as his records, and to meet that he has furnished this schedule which gives a summary of his records on the subject. So far as the necessity goes of showing that the paper shipped by rail was made from the
120 identical logs that came in by rail, that is plainly an impossibility, common sense shows it is, and the witness states it is, and the courts have not required that kind of showing, and when we get to the argument of the law we will present authorities on what is called the substitution of tonnage; we will have the interstate commerce commission rule and the text books and other authorities, holding that it is proper to substitute tonnage of the same kind, same amount or equal amount, of similar tonnage that is shipped out, and that it comes within the meaning of these provisions. The so-called r*f*und provision is not invalid. It is given the sanction of the courts. However, I think we will get along better by postponing the legal arguments and doing it all at once.

The schedule referred to and annexed to the deposition of Henry E. Fletcher was as follows:

(Here follows Schedule, marked pages 121-124.)

	Total.
1. Hemlock logs received over D. & M. Ry. Co.	20,481,619
2. Hemlock logs received by river	9,258,280
3. Hemlock logs received from Richardson Lbr. Co.	1,542,213
4. Hemlock logs received from Churchill Lbr. Co.	656,441
5. Total logs received	31,938,553
6. Lumber sold (local and reshipped by boat)	711,232
7. Logs delivered to R. Lbr. Co. (all river logs)	1,381,608
8. Total logs not made into paper	2,092,840
9. Balance made into paper	29,863,252
10. Total logs accounted for	31,956,092
11. Balance taken from or carried to stock on hand	17,539
(A plus sign indicates an excess of logs received over logs used. A minus sign indicates the contrary.)	
12. Total tons of sulphite made	27,331.1
13. Pounds per thousand feet of logs	1,834
14. Pounds of paper shipped by D. & M. Ry. Co.	117,408,337
15. Pounds of paper shipped by boat	
16. Local sales	2,378,699
17. Total shipments (Note 2)	119,787,036

Note 1. No railroad logs were received during 1912 because our supply was located on the "Tubbs Branch" of the D. & M. and the railroad company discontinued the operation of this branch, resulting in litigation with the railroad company which is still pending.

Note 2. The excess of paper shipped as compared with sulphite is due to the fact that a large amount of paper was made from other materials than hemlock logs. This schedule covers only hemlock logs which are the only class of logs involved in this suit.

The above including the opposite sheet annexed is correct and is to be considered as a part of my testimony of August 22, 1916.

HENRY E. FLETCHER.

Dated, September 6, 1916.

	1909	1910	1911	1912	1913	1914
1	4,915,490	2,982,244	2,638,980	(Note 1)	4,046,069	5,898,836
2		954,200	2,462,685	4,646,820	1,194,575	
3				1,466,295	65,610	10,308
4				656,441		
5	4,915,490	3,936,444	5,101,665	6,769,556	5,306,254	5,909,144
6	33,915	245,000		432,317		
7				1,271,495	104,465	5,648
8	33,915	245,000		1,703,812	104,465	5,648
9	4,080,380	5,150,449	4,492,143	5,227,665	5,315,878	5,596,747
10	4,114,295	5,395,449	4,492,143	6,931,467	5,420,343	5,602,395
11	x801,195	–1,459,005	x609,522	–161,911	–114,089	x306,749
12	4,199.6	4,728.3	4,066.8	4,408.2	4,950.8	4,978.4
13	2,058	1,836	1,810	1,687	1,862	1,774
14	18,587,807	19,195,306	20,491,264	20,376,966	19,196,319	19,560,675
15	44,325	373,949	297,144	571,780	228,513	462,988
16	Note 3					
17	19,032,132	19,569,255	20,788,408	20,948,746	19,424,832	20,023,663

Revising Exhibit 3 by using the actual yearly average in place of the estimated average of 1,900 pounds per thousand feet gives the following result:

	Logs received by rail	Paper shipped out by rail	Per cent of inshipments shipped out by rail
1909	4,915,490 feet	18,587,807 lbs	183 per ct.
1910	2,982,244 feet	19,195,306 lbs	350 per ct.
1911	2,638,890 feet	20,491,264 lbs	429 per ct.
1912		20,376,966 lbs	
1913	4,046,069 feet	19,196,319 lbs	254 per ct.
1914	5,898,836 feet	19,560,675 lbs	186 per ct.

It is impossible to trace any particular logs or classes of logs into the product as manufactured or shipped out.

Note 3. Lines 15 and 16 are figures together for the reason that our local trade is small—approximately 50 tons.

125 The deposition of Malcolm Wellington taken at the city of Alpena, Michigan, August 22, 1916, was here read as follows:

MALCOLM WELLINGTON, sworn for the plaintiff.

Examined by Mr. Clark:

I live in Alpena and am employed by the Fletcher Paper Company as sales manager. I have been engaged in making computations of the amount of logs shipped in during the years 1909 to 1914 inclusive by the Fletcher Paper Company over the Detroit & Mackinac Railway, and also the amount of manufactured products shipped out over the railway. The figures for the years 1909 to about 1913 I made every year, as long as I was in the capacity of taking care of the shipments here, and for the years since then I made the figures in the last two weeks. I made my computation of the logs shipped in over the railroad from the bill of particulars which was made up from the expense bills and checked by the D. & M. as being correct. To get the total we had to use some expense bills which were not involved in this suit. We made our statement of the manufactured products shipped out from the shipping bills—that pile on the end here.

Mr. Clark: We have presented subject to counsel's inspection the original expense bills that were used in the bill of particulars; also certain expense bills which were not involved in making up the bill of particulars. Some of them have been inadvertently omitted. We produce them, duplicate shipping bills showing the shipments out over the D. & M. railway. The shipping bills are all here with the exception of 9 and 10. They have been destroyed.

126 Witness continues:

In making my original figures for those years I then had this original to work from. I made them from the original shipping bills made by the shipping clerk. Those bills are exact duplicates of those in possession of the railroad company.

Mr. Clark: If the defendant requires we can give notice to produce the originals on the trial. In default thereof we will use the duplicates.

Mr. Henry: In this connection: To what extent are these figures contained in the bill of particulars, that we haven't mutually agreed to?

Mr. Clark: Practically all the in shipments are contained in the bill of particulars, with certain exceptions which Mr. Wellington will now explain.

Mr. Clark: We do not claim anything not in the bill of particulars. We think we have found some errors, but under our stipulation all errors are waived. The bill of particulars contains all of our claims we intend to make. The out shipments in all cases exceed the manufactured product of the logs shipped in by rail. If we use only logs as shown by the bill of particulars, that excess would be still greater; but in order to give the railroad company the benefit of the doubt, as we have done in all of our computations, we are including in

127 our computations of railroad logs shipped in, certain logs which were for various reasons not involved in the litigation at all so that we are showing that we shipped out manufactured product

not only representing all of the logs shipped in, for which we claim a rebate, but also to cover additional logs shipped in for which no claim is made; these additional logs being used merely for comparison of in shipments and out shipments, and not for the purpose of adding to or in any way changing the bill of particulars.

Witness: My statement includes all the logs shown in the bill of particulars for the year 1909. We have here the expense bills for a few thousand feet in addition, from January 1, to January 19, which were prior to the time that we have mentioned in the bill of particulars.

Mr. Henry: As I understand it, you do not intend to make any additional claim to them by virtue of this?

Mr. Clark: I do not. You understand it correctly.

Mr. Henry: Then I should think it would be immaterial.

Mr. Clark: It would be material because we show out shipments covering not only the logs in suit, but going further and covering logs not in suit, which must necessarily be mentioned to make a comparative statement of in shipments and out shipments.

Mr. Henry: To prevent your bringing any suit for those additional amounts.

Mr. Clark: We make no claim for those.

Mr. Henry: Well, we think it would be prejudicial under your statement, and therefore object to it as immaterial and incompetent.

Witness: The in shipment of logs in 1910, 1911 and 1913 compares the same with the bill of particulars.

Q. And 1914?

A. 1914 with the bill of particulars, and another claim of which the D. & M. now have the expense bills, for a million two hun-
128 dred thirty thousand feet; and some other expense bills that are not found in either claim. They are not involved in this action. I have made up a statement from these original documents or original expense bills and the duplicate original shipping bills, showing the shipments of logs in by rail, the shipment out by rail from 1909 to 1914 inclusive.

(Statement marked Exhibit 3, offered in evidence and was as follows:)

EXHIBIT 3 (M. W.)

Table showing out shipment by Fletcher Paper Company of manufactured product, averaging more than the amount of logs shipp*de* in:

	Logs received by rail	Paper shipped out by rail	Per Ct. of in shipments shipped out by rail
1909.....	4,915,490 ft.	18,587,807 lbs.	199 per ct.
1910.....	2,982,244 ft.	19,195,306 lbs.	399 per ct.
1911.....	2,638,980 ft.	20.491,264 lbs.	408 per ct.
1912.....	.....	20,376,966 lbs.	.....
1913.....	4,046,069 ft.	19,196,319 lbs.	249 per ct.
1914.....	5,898,836 ft.	19,560,675 lbs.	176 per ct.

Mr. Henry: Objected to as immaterial, incompetent and not the best evidence.

Q. What can you say as to whether the computations contained in Exhibit 3 are correct as made by you?
A. They are, to the best of my knowledge.

Mr. Clark: We offer in evidence all the documents used in the preparation of Exhibit 3, being the original expense bills and shipping bills. In this case they are duplicates, but we shall claim they are equally admissible as the originals. It is not my purpose to make the contents of all of them substantiative proof. They are
129 corroborative. They are practically the proof, but the witness's summary takes the place of the documents themselves.
Mr. Henry: We object to the introduction of them all because we think they are unnecessary and not put in in the way in which we can use them even if we attempt to. We object to the offer as immaterial and incompetent.
Witness: These are the same expense bills that were used in making up the bill of particulars, and were checked by defendant's accountants and all verified by the D. & M.
Mr. Henry: Now, to that extent they are all in evidence and we have no objection to treating them as proved and put in the bill of particulars. But other than that we object.
Q. In making the computation, in figuring the per centage, how many pounds of paper did you balance against a thousand feet of logs?
A. I figured the maximum amount 1,900 pounds.

Mr. Henry: Mr. Clark, are the books, papers and records that you put in here, is Exhibit 3, the summary of that?
Mr. Clark: It is.

Cross-examination:

Certain shipping bills for 1909 and 1910 were destroyed or misplaced. We cannot find them. I made the figures up for the years 1909 in 1910 and 1910. They were put in the record book
130 that was kept, showing the total shipments and the amount shipped by rail and the amount shipped by water.
Q. Mr. Clark has referred to a book here which is marked "Triplicate" and purports to be a book prepared by the Detroit & Mackinac Railway Company, and for convenience I wish you would let me have it designated.

(Same marked Exhibit 4.)

Just state what it is in general terms—what Exhibit 4 is?
A. The shipping book used by our shipping clerk in billing out all the shipments of paper. The first bill on that exhibit is dated June 11, 1914 and the shipment is to the Graham Paper Company. It signifies a shipment made by the Fletcher Paper Company for the account of the Graham Paper Company. From 1909 until 1914 the Fletcher Paper Company had books of this character and kept an accurate record of each shipment in them. Those are the books right

there. From books of this kind every pound of paper that has been shipped during the years 1909 to 1914 inclusive, and to whom shipped will be contained in these books. The D. & M. have the same record an exact copy of that on their own records.

Q. In this memoranda Exhibit 3, reading the first line: "Logs received by rail"—the first column. The next column: "Paper shipped out by rail." The third column: "Percentage of in-shipments shipped out by rail." Now the first line is "1909—4,915,490 feet."

A. That signifies the number of logs received by rail during the year 1909 by the railroad expense bills.

Q. Did Mr. Victor furnish you the amounts for those figures?

A. I took them from Mr. Victor's figures in the old book
131 that he used to keep a record in. As I remember making those figures up for him every year.

Q. Mr. Wellington, in taking these two years, 1909 and 1910, have you got any book or record where you made the computation?

A. Well, I have where Mr. Victor put his record—the figures I gave him.

Mr. Clark: We have that ready to produce, marked Exhibit 31. Exhibit 31 is read into the record as follows: 18,587,807 shipped by rail, 444,325 shipped by water, added together 19,032,132 in 1909. In 1910, 19,195,306 pounds shipped by rail; 374,049 shipped by water; total 19,569,355.

Witness: This book we call Exhibit 31, page 141 contains these figures in Mr. Victor's handwriting. Mr. Victor is now dead. The name of the book is "Record Book." The figures I stated on direct examination I made up each year for Mr. Victor and those were the figur-s that I made from the shipping bills that are now destroyed or lost. And in 1909 and 10 the log shipments were made from the expense bills themselves as made up in the bill of particulars.

Mr. Clark: We have had the books of shipping bills marked as exhibit 4 to 30 inclusive. Each book contains about 100 pages with two shipping bills to a page. For counsel's information we also produce two additional books of the same nature, marked Exhibits 32 and 33. Exhibits 1 to 31 inclusive are offered in evidence, but Exhibits 32 and 33 are merely marked for identification.

Witness: Exhibits 32 and 33 show shipments by boat from
132 1910 to 1914. I have not been able to find any more Detroit & Cleveland Navigation Company books. I have made a careful search for all books not produced and have not been able to find them.

Q. (By Mr. Henry) You testified that as to Exhibit 3 the first column is the number of feet of logs received by rail, and the second is the number of pounds of paper shipped out by rail? That it may be perfectly clear upon the record, I will ask you if you have knowledge of the fact that the number of pounds set opposite the number of feet were made out of the identical logs shipped in?

A. No.

I have no knowledge of the disposition of the logs represented in Exhibit 3, only from observation. I didn't have charge of the logs.

Q. (Mr. McNamara) In 1909—in Exhibit 3 you have put down figures showing that 4,915,490 feet of logs were received by rail?

A. Yes, sir. I do not know what proportion of these logs were sold by the Fletcher Paper Company or traded to other lumbermen here in the city. I do not know what proportion of them were sawed into lumber. Just merely took those figures from the bill of particulars that are as logs coming down by rail. I have no personal knowledge of what disposition was made of those logs. That is true from 1909 to 1914.

Mr. Clark: Counsel having noticed that there was nothing marked as Exhibit 2, it is understood that the records books referred to by Mr. Henry and Mr. Fletcher will be considered as Exhibit 2 in the case. After the reading of the foregoing deposition of Malcom Wellington, the following occurred:——

133 Mr. Clark: The schedule made by this witness I want to show to the Court. All of these schedules are more intelligible to the eye than to the ear, I think. Counsel have a copy of this. It shows the logs shipped in by rail during each year and paper shipped out, and he uses 1900 pounds of paper to a thousand feet for his computation. We have shipped out in each year from 199 percent to 408 percent of what was shipped in by rail, the difference being in river logs that they made into paper and shipped out the paper by rail. In 1912 they got no logs in by rail at all.

The Court: The 50 cents was paid on this basis?——

Mr. Clark: Fifty cents a thousand feet, but we are claiming $.50 on every thousand feet of logs shipped in on the ground that we shipped out paper representing not only of those logs but 200 to 400 per cent of them, regardless of our ability to show that the paper was made of the same logs that came in. In that connection the schedule of Mr. Henry E. Fletcher carries it down a little more carefully, because instead of using 1900 pounds he uses the exact number of pounds and makes 183 percent in the lowest year to 429 per cent in the highest year, and shows out of 31,000,000 feet of hemlock logs received about 20,000,000 were over the Railroad and 9,000,000 through the river. Of course, there was other pulp wood in addition received by river. So that they made paper from a very much larger amount of raw material than the logs shipped in over the railroad, which results in their shipping out so much more than the product of the logs shipped in. Counsel, of course, are at liberty to use this schedule to show to what extent we can prove the outshipment of the product of the very same logs that came in. We

134 cannot tell whether a pound of paper was made from all river logs or all railroad logs, or partly one or partly the other, or partly pulp wood.

Mr. McNamara: Well, your position is, if we got down say 2,000,000 feet of logs by rail and sold that 2,000,000 of logs to the Richardson Lumber Company to be sawed into lumber by them or whatever they want to use it for, and got in 2,000,000 feet of logs by water or through somebody else, some other source, that you could take the manufactured product of that 2,000,000 feet and off-

set it for the purpose of getting this rebate against the logs that came down by rail?

Mr. Clark: I think probably our theory would work out—carried you might say in the broadest possible way—it might work out to that result. As a matter of fact, the situation is not that way, the principle might work out to that exent. The actual situation is that all of the paper shipped out by boat might be deducted and still there would be a very large amount——

The Court: He would be entitled to $.50 on the balance anyway?

Mr. Clark: Yes, so even if we were deprived of the $.50 on all that was shipped out by boat there would still be a large amount on which we are entitled to the $.50 by reason of the fact that only 4 or 5 percent of our manufactured product was shipped out by boat out of the enormous amount of paper they make. They ship 117 million pounds by rail and only 2 million pounds by boat and local sales together.

135 The deposition of WARREN PENNIMAN taken at Alpena, August 22, 1916, was then read as follows:

WARREN PENNIMAN, sworn for the plaintiff.

Examined by Mr. Clark:

I live at Alpena and am bookkeeper for the Fletcher Paper Company.

Q. I asked you or the Fletcher Paper Company to take the bill of particulars in this case and make a computation of interest in various months as shown by my instructions, and for that purpose to separate the items of the bill of particulars in various months. I show you Exhibit 34 purporting to be an interest statement by months and ask you if you made that computation?

A. I did.

Q. Did you obtain all the material from the bill of particulars in the case?

A. I did.

Q. What can you say as to whether your computations were correctly made?

A. I would say they are correct so far as my knowledge goes.

Q. I show you another statement marked Exhibit 35 purporting to be an interest statement by periods. Did you obtain the contents of this statement from the bill of particulars in the case?

A. I did.

Q. And did you make the computations correctly as shown by the various headings and line headings in this statement?

136 A. Yes, sir.

Mr. Clark: We offer Exhibits 34 and 35 in evidence.

Q. I show you certain expense bills which have already been used in the case in making up the bill of particulars, representing ship-

ments from the Onaway & North Michigan Railway Company. Are they here?

A. Yes, sir.

On these expense bills there is a separation of freight where the total would amount to four fifty. They are separated into items of $3 and $1.50. The D. & M. made that separation. It was made before the freight was paid. The $3 represents the proportion the D. & M. receives and the $1.50 the proportion the Onaway & North Michigan receives. The D. & M. collected the entire $4.50.

137 The interest computation referred to by the witness, being Exhibits 34 and 35, were as follows:

By Periods.

The periods used are as follows:

First Period—Nov. 24 (switching); Nov. 26 (log freights); 1909 to Feb. 11, 1911.

Second Period—Feb. 12, 1911, to July 22, 1912.

Third Period—July 23, 1912, to March 22, 1913.

Fourth Period—March 23, 1913, to July 25, 1914.

Fifth Period—July 26, 1914, to Dec. 14, 1914.

Details.

	O. & N. M.	Switching.	Log freights.	Int. at 5 per ct from last day of month.
First Period—				
(a) To Jan. 31, '11, as per monthly statement ..	.....	1,070.00	.....	289.72
			3,723.43	1,031.19
(b) Feb. 1-11-'11	.....	82.50	.....	19.93
			353.06	85.32
		1,152.50	4,076.49	1,426.16
Second Period—				
(a) Feb. 12-28-'11	.....	163.00	.....	39.40
		443.86	.....	107.27
(b) March 1, '11, to June 30, '12	.....	2,012.50	.....	411.42
As per m'thly st'm't.....	.....	.....	448.98	106.55
(c) July 1-22-'12	.....	52.50	.....	8.97
		2,228.00	892.84	673.61
Third Period—				
(a) July 23-31, '12.....	.....	32.00	.....	5.47
138				
(b) Aug. 1, '12, to Feb. 28, '13	.....	784.50	.....	117.82
As per m'thly st'm't.....	.....	.....	1,912.50	274.21
(c) Mar. 1-22, '13.....	.....	238.50	.....	32.80
			1,012.82	139.27
		1,054.50	2,925.32	569.57

Fourth Period—				
(*a*) Mar. 23-31-'13	.....	123.00	.....	16.9
		5.60	.....	.7
(*b*) April 1, 1913, to June 30, '14	.....	1,549.50	.....	152.3
As per m'thly st'm't.....	.....	.....	4,589.81	421.4
	2,051.59	.....	.....	217.3
(*c*) July 1-25-'14	.....	44.50	.....	3.1
.....	342.98	.....	.....	24.2
	2,394.57	1,717.00	4,595.41	836.3
Fifth Period—				
(*a*) July 26-31-'14	95.62	.....	.....	6.7
		12.00	.....	.8
(*b*) Aug. 1-Nov. 30, 1914..	.....	22.50	.....	1.5
As per m'thly st'm't.....	119.66	.....	.....	7.9
	215.28	34.50	.....	17.1

Recapitulation by Periods.

	O. & N. M.	Switching.	Log freights.	Interest.
First Period	.....	1,152.50	4,076.49	1,426.1
Second Period	.....	2,228.00	892.84	673.6
Third Period	.....	1,054.50	2,925.32	569.3
Fourth Period	2,394.57	1,717.00	4,595.41	836.3
139 Fifth Period	215.28	34.50	.....	17.1
	2,609.85	6,186.50	12,490.06	3,522.7

Interest Statement, Fletcher Paper Co.

	O. & N. M.	Switching.	Log freights.	Int. at 5 pc et from la day of mont
Nov. 1909.				
(Nov. 24–30)	.....	18.00	.....	5.
December, 1909	.....	39.00	.....	11.
December, 1909	.....	.....	130.93	39.
		57.00	130.93	56.
Jan., 1910	.....	43.50	.....	12.
Jan., 1910	.....	.....	834.07	246.
Feb., 1910	.....	43.50	.....	12.
Feb., 1910	.....	.....	653.27	190.
March, 1910	.....	74.50	.....	21.
March, 1910	.....	.....	453.56	130.
April, 1910	.....	172.00	.....	48.
April, 1910	.....	.....	151.77	43.
May, 1910	.....	82.50	.....	23.
June, 1910	.....	107.00	.....	29.
June, 1910	.....	.....	109.69	30.
July, 1910	.....	48.00	.....	13.
July, 1910	.....	.....	153.78	41.
Aug., 1910	.....	27.00	.....	7.
Aug., 1910	.....	.....	228.68	60.
Sept., 1910	.....	60.00	.....	15.
Sept., 1910	.....	.....	2.13	
Oct., 1910	.....	39.00	.....	10.
Nov., 1910	.....	60.50	.....	15.
Nov., 1910	.....	(Oct.–Nov.)	4.85	1.

140	O. & N. M.	Switching.	Log freights.	Int. at 5 per ct from last day of month.
Dec., 1910	.....	46.50	.....	11.63
Dec., 1910	.....	.....	155.73	38.93
		804.00	2,747.53	1,005.35
Oct., 1912	.....	81.00	.....	12.83
Nov., 1912	.....	94.50	.....	14.57
Dec., 1912	.....	55.50	.....	8.33
		1,557.50	.....	280.17
Jan., 1911	.....	209.00	.....	51.38
Jan., 1911	.....	.....	844.97	207.73
Feb., 1911	.....	245.50	.....	59.33
Feb., 1911	.....	.....	796.92	192.59
March, 1911	.....	323.50	.....	76.83
March, 1911	.....	.....	429.70	102.06
April, 1911	.....	90.00	.....	21.00
April, 1911	.....	.....	19.28	4.49
May, 1911	.....	72.50	.....	16.61
June, 1911	.....	56.00	.....	12.60
July, 1911	.....	51.00	.....	11.26
August, 1911	.....	51.00	.....	11.05
Sept., 1911	.....	63.00	.....	13.39
Oct., 1911	.....	76.50	.....	15.93
Nov., 1911	.....	63.00	.....	12.86
Dec., 1911	.....	68.00	.....	13.60
		1,369.00	2,090.87	822.71
Jan., 1912	.....	144.00	.....	28.20
Feb., 1912	.....	251.00	.....	48.11
March, 1912	.....	417.50	.....	78.28
April, 1912	.....	149.00	.....	27.31
141				
May, 1912	.....	120.00	.....	21.50
June, 1912	.....	16.50	.....	2.89
July, 1912	.....	84.50	.....	14.44
August, 1912	.....	73.50	.....	12.25
Sept., 1912	.....	70.50	.....	11.46
Jan., 1913	.....	105.00	.....	15.31
Jan., 1913	.....	.....	785.06	114.49
Feb., 1913	.....	304.00	.....	43.07
Feb., 1913	.....	.....	1,127.44	159.72
March, 1913	.....	361.50	.....	49.71
March, 1913	.....	.....	1,018.42	140.04
April, 1913	.....	124.00	.....	16.53
May, 1913	.....	38.00	.....	4.91
June, 1913	.....	32.00	.....	4.00
July, 1913	.....	55.00	.....	6.65
July, 1913	667.74	.....	.....	80.69
August, 1913	.....	73.50	.....	8.57
August, 1913	344.73	.....	.....	40.22
Sept., 1913	.....	61.50	.....	6.92
Sept., 1913	348.46	.....	.....	39.20
Oct., 1913	.....	81.00	.....	8.78
Oct., 1913	141.38	.....	.....	15.31
Nov., 1913	.....	49.50	.....	5.15
Dec., 1913	.....	43.50	.....	4.35
	1,502.31	1,328.50	2,930.92	763.62

	O. & N. M.	Switching.	Log freights.	Int. at 5 per ct from last day of month.
Jan., 1914	.....	90.50	.....	8.68
Jan., 1914	.....	.....	1,389.61	133.17
Feb., 1914	.....	184.50	.....	16.92
Feb., 1914	.....	.....	1,985.61	182.02
March, 1914	.....	440.50	.....	38.54

142	O. & N. M.	Switching.	Log freights.	Int. at 5 per ct from last day of month.
March, 1914	.....	.....	1,214.59	106.28
April, 1914	.....	172.00	.....	14.33
May, 1914	.....	54.00	.....	4.28
May, 1914	184.55	.....	.....	14.61
June, 1914	.....	50.00	.....	3.75
June, 1914	364.73	.....	.....	27.35
July, 1914	.....	56.50	.....	4.01
July, 1914	438.60	.....	.....	31.06
August, 1914	.....	22.50	.....	1.50
August, 1914	119.66	.....	.....	7.98
	1,107.54	1,070.50	4,589.81	594.48

Recapitulation by Years.

	O. & N. M.	Switching.	Log freights.	Int. at 5 per ct from last day of mo. to 1-1-16.
1909	.....	57.00	130.93	56.45
1910	.....	804.00	2,747.53	1,005.35
1911	.....	1,369.00	2,090.87	822.71
1912	.....	1,557.50	.....	280.17
1913	1,502.31	1,328.50	2,930.92	763.62
1914	1,107.54	1,070.50	4,589.81	594.48
	2,609.85	6,186.50	12,490.06	3,522.78

After reading the foregoing deposition of Warren Penniman, the following occurred:

143 Mr. Clark: The statement made by this witness was similar to that I made in the Churchill Lumber Company case, the only difference being that in this case he makes up his totals by months instead of by years and claims interest from the end of the month instead of the end of the year.

Mr. Henry: What do you refer to now?

Mr. Clark: To Exhibit 34 attached to the deposition of Warren Penniman in the Fletcher Paper Company case.

I might say that the statement by periods separates that in the same way that we did in the Churchill Lumber Company case, the totals being precisely the same as in the other statement. You will find a difference between this statement and the bill of particulars

again in that this statement leaves out the shipments in 1909 prior to November 26, which are shown in the bill of particulars. That reduces the amount as compared with the bill of particulars. This shows total of overpayments of $2,286.41, total interest of $3,522.78, which covered interest only up to January 1, 1916. I have made the computation from January 1 to September 20, 1916, and if I may be considered under oath in all of the cases, having been sworn in one of them, I will state that that amount at 5 per cent simple interest is $768.72, making the total for the Fletcher Paper Company $25,577.91.

Also in that connection, I will state in case it becomes convenient to use the amount that the items deducted in 1909 which have been stricken out from the bill of particulars as prior to November 26 amount to $4,399.19.

The Court: That $25,577.91 includes what you claim you
144 are entitled to on account of the reshipment of the products, afterwards adding $.50 a thousand?

Mr. Clark: Of course, that includes all that with interest to this date. But we will claim the right to double this amount.

— McNamara: That is made of several things, one an overcharge on logs coming into Alpena, one an overcharge on switching from Broadwell's dam to Alpena, and a third that rebate or refund.

Mr. Clark: No, the refund is not figured separately and for a simple reason. The Railroad Commission rate gave a certain rate on logs. It said $.50 if not reshipped. We merely did not add the $.50 but figured the commission rate. In other cases we add the $.50 where nothing was reshipped. In this case we took the Commission rate just as it stood without the $.50, so if you are entitled to $.50 more you simply have to multiply the total number of feet by $.50 a thousand feet. The separate amounts were made of two items again because there was one class of items which was kept separate. The Onaway and North Michigan items were charged at a flat dollar a thousand and put in separately for that reason, but the log freights were made of two items, $12,490.06 and $2,609.85, totaling $15,099,91 for log freight, switching charges $6,186.50. Now the switching charges did not involve the $.50 a thousand feet at all. They have nothing to do with that. Those two make the $21,286.41, which is the principal of the claim. Your Honor will recollect that what they call a refund or rebate was in reality an addition to the rate. They made a rate without it and then said if the
145 manufactured product is not reshipped you could add $.50 a thousand, so in cases like the Fletcher Paper Company and Michigan Veneer Company, where we claim all the manufactured product was re-shipped we merely had to take the Commission rate. In other cases we had to find out what was not reshipped and add $.50 a thousand for those items. I do not mean add to our claim, but add to the freight rate, which meant a deduction from the claim.

Mr. Henry: At this time we object to the testimony as to that reshipment, on which they claim the refund. The further objection that where a thousand feet of logs makes, say, 1900 pounds of paper that is shipped out, that it does not signify that that 1900

pounds will be equivalent to a thousand feet of logs. Now 1900 pounds would only be a portion of a car. We insist that they might have made this into an extract and only have gotten a few quarts out of these logs—we contend that they are entitled only to such refund as would be equivalent to the shipment of a thousand feet of logs. Now it might take three or four carloads or five or six car loads to make one car load of out-shipment, and where there is practically no way of determining the manufactured product upon an equitable basis they have got to take the number of feet of logs that are in a car and then take as many of those cars as would be necessary to make one carload of out-shipment. We also contend that they have got to show that it is made out of the identical logs. They could not take the best logs and make them into lumber or something else, nor they could not trade logs, the idea is it is
146 the identical log that comes in and manufactured, and there must be an equivalent in the out-shipment to that which is an in-shipment.

Mr. Clark: That appears to bring up again the question of substitution of tonnage which is quite complicated, and I think could be best handled at the close of the evidence.

The Court: Probably it would be better to leave it until then, but I do not see how you are ever going to identify those logs after they are made into pulp and then into paper.

Mr. McNamara: It was their duty to do it if they wanted a refund.

Mr. Clark: I don't quite understand Mr. Henry's theory of the car in and the car out. It does not make any difference if the carload of logs might be concentrated down to a quart, if that goes out it is the manufactured product of the in-shipment. In this case, however, it appears that paper has gone out in considerable volume, a great many hundred million pounds of paper in those years to compensate for the 20 million feet of logs that have come in.

Mr. Henry: A carload of logs would not make a carload of paper, would it?

Mr. Clark: I am not sure. I don't know. Probably not. The logs being coarser freight, but that is not the test, as we contend. The reason I suggest the postponement of this, it might come up in respect to the Michigan Veneer Company also, and we better
147 take the arguments only when we are through with the evidence, I believe.

Mr. McNamara: I think that is the more logical way to do it.

Mr. Baker: Leave the argument until later, but I want to make an objection right here, that on the testimony introduced and the statements of counsel that $.50 refund was just a device to give the Fletcher Paper Company a rebate, and it is void and to allow them to recover that $.50 would be in violation of the Act.

Mr. Clark: I want to get into the record the fact that one day's interest on the principal sum of the Fletcher Paper Company is $2.98.

ALLAN M. FLETCHER, Recalled.

Examined by Mr. Henry:

I am President of the Fletcher Paper Company and have been president since January 1913. Mr. Frank W. Fletcher preceded me. I didn't have much to do with making these petitions personally before 1913.

Q. Order No. D-189 in the rate case record at page 120, is an order relative to switching charges between Alpena and Fletcher's Dam. I ask you to state whether any one uses that branch except the Fletcher Paper Company?

A. There have been various quantities of saw logs landed on that branch. There have been certain amounts of lumber shipped out over that branch by the Thunder Bay Lumber Company. It is there for the use of anybody. Whoever used it paid the D. & M.

148 I can't tell you whether or not all such shipments were made under the switching charges of the order which prevailed before October 1909. From 1909 to 1914 inclusive off and on we had an independent scaler that scaled the logs that came to us over the D. & M. off and on simply to check our own figures. I think we scaled most of these logs twice—scaled at the camp and also scaled at the yard. Taking it altogether, since 1909 to 1914 inclusive, I would say the scale would be against us. That is the railroad scale was larged than our scale.

We treated that branch to Fletcher's dam as a branch of the railroad company over which the public generally could transport logs and lumber product. The logs came to our mill either by rail or water. Our mill is on the north side of Thunder Bay river. We have a landing there and a track runs between our mill and the river. When logs came over the D. & M. track, they were either unloaded on this landing ground, or dumped into the river at our dam. Where they were unloaded so they went into the river, would be right at our mill and in front of our mill. The advantage of having them put into the river first, was because in the winter time when they came down, we have a hot pond there in which the logs are dumped so we could get them into the mill without their freezing in there. We got some logs from other mills. We have traded logs once or twice with some other mills when we happened to be short, or they happened to be short. We never made a practice of getting logs from other mills. We have never piled any logs that came down the river. They have gone direct into the process of manufacture. Those logs were all commingled in the mill. I don't think we could pick out and tell what was

149 manufactured from the railroad company's logs and what was manufactured from those that came down the river, after it is manufactured. We have a record that will show the logs that came down over the railroad exclusively, of logs that came to our mill in any other way.

Mr. Clark: Here it is, attached to Mr. Henry E. Fletcher's testimony. He gave us the logs that came by railroad 20,481,619 feet;

received by river 9,258,280 feet; received from Richardson Lumber Company 1,542,213 feet; and from Churchill Company 656,441. They cannot distinguish the paper after it was made, as to which paper came from which class of logs, but the records shows how much was made into paper and how much was not. That 29,863,-252 feet of this was made into paper and 2,092,840 was not made into paper, and that shows just how it was divided, 711,232 feet of this was made into lumber and sold either locally or reshipped by boat, and the balance delivered to the Richardson Lumber Company, being all river logs. The record won't show whether the lumber, the 711,000 feet was made out of rail logs or river logs. It does show that the Richardson Lumber Company got all river logs. All of the logs were manufactured into paper except those two items. One of those items is shown to be all river logs, and the other item of 711,000 feet out of 31,000,000 feet is not distinguished as to whether it was river or railroad logs. The railroad logs that were made into paper will be without any question the difference between 20 million feet and 711 thousand feet.

Mr. Henry: That is on the theory that all the logs were manufactured into paper except what was sold or disposed of in other ways?

150 Mr. Clark: Yes. How much of that paper went out over the D. & M. we show also to the pound and what went out in other ways we show also in pounds, there being 117,408,337 pounds shipped over the D. & M. and 2,378,699 shipped out by boat or sold locally. We make the broad admission that as to whether that 2 million feet that went out by boat or was locally sold, was made from river logs or railroad logs, there is nobody on earth could tell. I will not admit that the paper that was shipped out over the D. & M. is separated from the pap- made from other logs.

Q. How do you prepare your material, raw material, how do you prepare that for making pulp?

A. The log is cross cut into two foot cuts, the bark and rotten wood is taken off, and if the log is too large to be put into this machine to be split, it is put into a chipper and chipped up into fine chips. It cuts clear down so that it takes the center of the log. There is about eight to ten per cent waste in the bark. We burn that for fuel. This may be one or two per cent of the fuel used.

Redirect examination.

By Mr. Clark:

The pulp wood comes down by rail and water and sleighs.

The pulp wood is in the form of small logs from four to eight feet long. When we use the word "logs" we do not mean pulp wood. The railroad scale is taken inside of the back and considerably further.

The Plaintiff here rested its case.

151 *Statement of Defense and Motion to Dismiss.*

By Jas. McNamara:

Mr. McNamara: It has been deemed proper on the part of myself and colleagues at this time to follow the example of Mr. Clark and present to the Court further facts in the chronological order of the case, and also some facts that have an historical value as showing the conditions that existed at the time this litigation was commenced.

We consider it just as necessary in order for the Court to understand fully and intelligently the entire condition of this controversy that the Court should be conversant not only with the chronological history of this lawsuit, following it from its inception before the R. R. Commission to its ultimate end in the U. S. Supreme Court, but that the Court should know the conditions that existed at the time so that he may fully and fairly and intelligently understand just exactly what the whole matter was about from its very inception to its end.

A great many decisions have been read here by Mr. Clark in giving his chronological history of the case that seem to be very important in the litigation that we are now trying. In our theory they are not so important because none of the questions that are before this Court at the present time have ever been before any court in this state in this controversy prior to this time. And in considering these decisions, your Honor, of course, we will go over them carefully, and it will be observed that the only thing that they decided —that the only thing they settled in this controversy or attempted to settle, was one question, that under the proofs submitted by
152 the Railroad Company they were unable to say that rates or orders of the Michigan Railroad Commission would be confiscatory if put into effect; that is the trend of all the decisions, and that is all that any of these decisions have ever settled in this matter, and that is not exactly the controversy that is here before this Court now, although certain parts of the matter in certain contingencies of this case come up before the Court.

Your Honor will remember the first decision read by Mr. Clark—the decision of Judge Murfin in the Wayne Circuit Court—and I think, as bearing on this case and having some significance historically in connection with the present controversy it would be well for me to call your Honor's attention just exactly to what Judge Murfin said: After going over the entire controversy, showing the labor he had put upon it and things of that kind, he said: "Judicial interference should never occur unless the case presents clearly beyond all doubt such a flagrant attack upon the rights of property under the guise of regulation as to compel the Court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use. While undoubtedly the acts prescribed by the commission seriously affect the Railroad, the effect is not of a class that permits the

Court to afford relief. Counsel for the company in his very able brief points out with much force and effect the recent State regulation upon the earning power of this Railroad, the large taxes paid, the two-cent fare law, the excess baggage law and other matters of regulation which undoubtedly have proved serious in this particular instance, of serious concern, and were his brief before this Court as a Railroad Commission rather than as a branch
153 of the judiciary, a different conclusion would be reached. But under the facts as they are disclosed by this record and the authorities the bill of complaint cannot be maintained."

In other words, if your Honor please, Judge Murfin was so embarrassed from the facts that were submitted in this case to him for his decision, and also obsessed that under the law he had no right to make any deci-ion changing the orders of the Railroad Commission unless it showed upon its face that they were absolutely confiscatory, that he was free to say that if sitting as a railroad commission that these rates would never have been put into force and effect by the Railroad Commission or by any other Court in this state.

Again, there is a decision of Judge Ostrander in which he took the position that these rates, under the showing of the Railroad Commission did not show that they might be confiscatory. In other words, the learned Court took this position, it being a short cut to show exactly what the statutes say, he took the position that unless these rates would put a railroad company into the hands of a receiver that the Courts had no power to change or amend them in any form or particular. And he decided and said in his opinion that the rate provided by the Railroad Commission was much lower than the Alpena Lumbermen had ever received or had hoped to receive, and it was only by reason of that one fact alone that the Supreme Court of the State of Michigan entered an opinion affirming the opinion of the Court below.

And I want to call your Honor's attention to this fact, that was owing to two things that occurred in this case, which neither myself nor Mr. Baker ever had an opportunity to investigate
154 and only came to our knowledge after the decisions were made.

Mr. Clark: I don't want to be critical, but is this a statement of what you expect to prove?

Mr. McNamara: Well, this is a statement of what is in the case.

Mr. Clark: Well, is it your opening statement or an argument?

Mr. McNamara: I am going to go on in my own way, unless stopped by the Court.

Mr. Clark: Well, for my own information, I want to know if you are going to introduce evidence in regard to what you are saying or whether you assume your evidence is in the record and are making an argument?

Mr. McNamara: This that I am talking about is in the record.

Mr. Clark: Then this is your argument, rather than your statement.

Mr. McNamara: When this case was appealed to the Wayne

Circuit Court and testimony was taken in the case, one of the things that we had contended and will be found in this record from start to finish had never gone over one of the logging branches of this railroad and knew absolutely nothing of the conditions that existed up there. When the rate man was on the stand, and his testimony is here, we interrogated him about it and he never got beyond Alpena, although he was sent up to go over the
155 logging branches, he never went over them, and we insisted that in order for the railroad commission to have judged intelligently of the conditions that existed up there at the time, it would be necessary for them to have gone over the branch, and we could have put them on the stand if necessary, to question them as to what conclusions they came to by what they saw. They are the custodian of all reports that are filed by railroad companies, and a report was filed by Mr. Hawks and in that report, in a private letter to one of the principal stockholders of the railroad, he had said that the railroad had been taxed for double its value, and the Railroad Commission went to work and got that in and attached it to their findings, and when it went back from the Wayne Circuit Court to the railroad commission, and when the- found out the questions that we had raised, without our knowledge, they come and say in their second report that they had gone over the logging branches of the railroad between the time the testimony had closed in the Wayne Circuit Court and was submitted to them, that they had gone over the logging branches of the railroad and they found such conditions as warranted them in sustaining the order they had already made, and then they attached to that report a copy of this private memorandum of Mr. Hawks, and neither myself or colleagues ever had the opportunity of knowing that they had introduced evidence, that we knew nothing about or had an opportunity of cross examining them on or showing by an explanation these matters before the Court.

And it was upon these very matters that the decision in this case turned, these matters that were placed in extracts of the record by the Railroad Commission, or some one of their clerks in their behalf.

Mr. Clark: There is no jury here, and I don't suppose
156 it makes much difference, but just so I won't be considered as assuming this is correct, I take an exception to this statement on the grounds that it is not properly a statement, but is an argument, which is not proper at the present time, as the plaintiffs have the opening argument, and that if counsel should prove all that he contends, if that is to be considered as an opening statement, it is all disposed of and adjudicated by the past litigation, this was all brought before Judge Murfin, referred to in his opinion, and is therefore under the decisions of all the Courts out of place. I do not mean to interrupt, but I want to object on the record.

Mr. McNamara: I am just explaining the matters that are in the decisions and matters of record in this case.

The Court: It is your claim they did not go over the branches?

Mr. McNamara: Why, Judge Ostrander himself said it is too

bad they could not have been informed of what the railroad commission had seen in going over the branches.

Mr. Clark: Judge Murfin passed on the question, however, in the opinion, and do you mean this Court is going to open up that question again?

Mr. McNamara: Well, I am not anticipating what the Court is going to do, one way or the other.

The Court: Well, I don't think we will get anywhere with this controversy at all. I think you better let Mr. McNamara
157 proceed and your objections will be noted, and at the end of it, if there is anything you want to correct, you will have an opportunity to do so.

Mr. Clark: I have no disposition to interefere and I do not want to be discourteous, but I want my objection on the record.

The Court: Very well, it will be noted.

Mr. McNamara: Now, if your Honor please, at the time this complaint was made against this railroad there was a different condition of affairs existing at that time than had existed in this state for many years previous that *that*. In 1907 the legislature of this state passed an act creating the railroad commission, and by the terms of that act they said that hereafter any shipper who considered himself aggrieved by any tariff schedule put in effect by any railroad could apply to the Railroad Commission by making a complaint, and the Railroad Commission would give them a hearing and grant relief if it was found that the tariff schedule was excessive or unduly discriminatory.

Now, prior to that there was nothing in the state but the common law remedy for shippers and railroad companies, if a shipper felt himself aggrieved, if he thought he was overcharged by a railroad company, he went into a Court and brought an action against the railroad company for the excessive charge, and you could have just as many law suits as there were aggrieved shippers and you could have just as many determinations as these aggrieved shippers would go to the different courts, and you would have just as many different judgments as the jury or judge before whom the case was
158 tried would give in a given case. One jury in Alpena county might give a shipper a judgment for excessive freight rates on a certain sum, another one in Alcona county might give a different one to another; in Onaway there might be a different one, all for the same shipment for the same distance, so in order to unify rates and give any uniformity whatever, this act was passed; and in 1909 the act was amended so as to enable not only that tariff where they came to the Railroad Commission and made their complaint against the tariff for being discriminatory or unjust or excessive, but containing another clause that if after the Railroad Commission had made a finding that a certain schedule was excessive or was discriminatory, that if they had any action against the railroad company by reason of the excessive or irregular charge it was their duty to come before the railroad company for reparation and have the matter brought to the attention of the railroad company, and then the Commission after hearing would make an order that so

much was due the shipper, if anything was found to be due, and then the shipper would have an opportunity to refund, the railroad company would have an opportunity to refund to the shipper, if they so decided it; but if they refused to refund it then it was the duty of the shipper to bring his action in court, and that finding of the Michigan Railroad Commission would be prima facie evidence of the amount that he was overcharged. If your Honor please, that law became effective on the first of September, 1909, and was the law at the time that the Michigan Railroad Commission made the orders in these cases.

Now, at the time this thing came up the whole matter was new, the question of going down before the railroad commission and having a complaint, hearing and trial before the commission
159 was a new thing, and when we came to look up the acts of the Railroad Commission we found that a great many anomolies appeared at that time, and it seemed to us a strange proceeding, and I want to call your honor's attention at this point to what I said in my brief at that time, because it is as pertinent now as it was then, to what the railroad company was up against in going before the railroad commission on a complaint made by a shipper.

"The law creating the Michigan Railroad Commission does not provide an impartial — of its proceedings," etc.——

Now, it was before that Commission at that time that we had to appear and answer a complaint from Alpena shippers, and it is necessary in our opinion, that at this time we should know just exactly what the conditions were at Alpena at that time.

Your Honor can remember, and I remember, when Alpena was one of the most thriving lumber towns in the state of Michigan, outside of Bay City and Saginaw, when they had from twenty to thirty mills going in that part of the country cutting lumber. At that time this Railroad Company had built endless logging branches for these people to bring down millions and millions of feet of lumber to Alpena to feed their mills but at the time this complaint was made there were only five mills that were in operation in the city of Alpena; and at the present time, as bearing on the conditions that exist there, there are but two mills in Alpena that are in commission, three of them having gone out of commission since this case was tried.

Now, as bearing on the conditions, I call your Honor's attention to the condition that existed at that time. The railroad company at the time this complaint was made, we show that of the freight total ton-age of the entire railroad 70.21 of its total earnings for
160 the year 1909 was made up out of logs, lumber and forest products. We also show that at this time some products of agriculture, corn, flour, grain, hay, fruit, vegetables and cannery products amounted to only three per cent of its entire freight earnings, and that the product of animals, such as live stock amounted to only one and one quarter per cent of its total freight earnings. This as bearing on the fact that at the time these complaints were made the forest products were being depleted from that part of the coun-

try at that time, that conditions that existed did not warrant a reduction in the revenue because the condition that existed at that time was entirely different than the condition that existed a few years before that, and I asked Mr. Hawks on the witness stand, and I call your Honor's attention to what he says in this regard about the defendant. He said on page 306 of the record that it cost double the money now to do the logging business that it did ten years ago. (Reads from the record.)

Now, we see the conditions that existed up there at the time these complaints were made. The lumbermen of Alpena had different rates on different logs, there was a rate on pine of $3.75, a rate on hard wood of another figure; a rate on hemlock of another figure; and they wrote and asked Mr. Hawks to come up there and meet with them for the purpose of fixing a rate and Mr. Hawks went up there in December, 1908, other officers of the railroad went up with them; they had a meeting with the Alpena lumberman and they were all present; and at that meeting he was asked to make a straight rate of this kind and he consented to do so, and they wanted a rate at that time of $3.00 a thousand on all kinds of logs and Mr. Hawks compromised by making it $3.25 a thousand, which was per-
161 fectly satisfactory to the lumbermen assembled there at that time. Now, if your Honor please, let us see how this controversy arose.

Prior to that time Mr. Frank Fletcher had been enjoying a different rate than the Alpena commercial lumbermen, and represented, and it was true, that the hemlock he was using in making paper was of an inferior quality than hemlock used in making lumber, and that he ought to be accorded a $.50 reduction on the rate as against the commercial lumbermen; he had been accorded that, but Mr. Hawks in complying with the wishes of the Alpena lumbermen promulgated M. R. C.-205, making the freight rates that were wanted by them. Mr. Fletcher came down then and when he found out he was not to get his differential of $.50 he was very angry about it, he came to Mr. Hawks' office and demanded it, and Mr. Hawks told him he would be very glad if the railroad commission gave him that differential on the logs he brought down, and he sat down and wrote a letter which your Honor has heard read here, asking the Railroad Commission to give him a right to do that, and that was refused, and as soon as that was refused, if your Honor please, the whole trouble in Alpena started.

Mr. Fletcher then made a complaint to the Railroad Commission in which he said the D. & M. Railroad was discriminating against the city of Alpena in certain tariff rates that he named in his complaint.

At that time there was in existence in Alpena M. R. C.-205 that your Honor has heard, which was the tariff created for these lumbermen who had logging branches that were built for them to bring out their logs from remote parts of the woods onto the main line and into the city of Alpena, and M. R. C.-208 was a mileage rate that was created for the purpose of helping out the

162 farmers, the men who lived along the main line of the Railroad for whom no logging branches had to be built, but who sold their lumber along the line of the railroad, and for people who lived along the line of the railroad, such as Millersburg and Onaway, who had no water competition as against the railroad, and it was expressly stated in that that it was for that purpose, and expressly stated in that that could only be in effect, that tariff could only be in effect by people who re-shipped the entire product by rail, and there was no refund in it either. We had in effect at that time M. R. C. No. 275 that provided certain rates between somewhere below Tower in to Cheboygan and from Tower in to Alpena. Now, Mr. Frank Fletcher went down and made this complaint, and after this complaint was made there were two other complaints made by him, one about the switching charge because it had been changed under the new disposition of things from $2. to $5.; he made a complaint to have that reduced back to $2., and to have Broadwell's dam called a station on the D. & M. Railroad, so that all shipments of stuff outside of Alpena to Broadwell's dam should carry the same rate as if they shipped in to Alpena instead of going five miles up to the Broadwell's dam.

When the hearing came on the complaint made by Mr. Fletcher on logs was abandoned and on the 19th day of April, 1909, the complaint in the present case made by Gilchrist, Island Mill Lumber Co., Churchill and the Richardson Lumber Co. was made and filed in Court.

Now, if your Honor please, right here I want to call your attention so you will understand precisely what that complaint was. Here is what the complaint was that was filed by these people. (Complaint read.)

163 Now, your Honor will see, that in that complaint it was only charged that the discrimination was in the tariff on the shipment of logs north of Alpena in to Cheboygan, as against logs shipped south of Cheboygan into Alpena, and that M. R. C. No. 275 that was in effect at Cheboygan gave Cheboygan an advantage over the Alpena Lumbermen in M. R. C.-205. When I came to examine that I saw that that was true and I called the attention of the railroad officials to it. Many excuses were given for it which are idle here, but I prevailed upon Mr. Hawks and the officials of the railroad, for the very purpose of avoiding this litigation, to equalize these rates and publish a new tariff rate north of Alpena into Cheboygan that would equalize the rate with M. R. C. 205. That was done. That rate went into effect on the first day of June, 1909, was filed with the Railroad Commission, was accepted in the office of the Railroad Commission, was published in the offices of the D. & M. Railroad Company, and became effective on the first of June, 1909, three days before the hearing took place upon the complaint made against it.

When I went down to Lansing I very naturally felt that we didn't have any law suit down there, and when the matter was brought up I called the attention of the Commission to the fact that the rate had been equalized and that there wasn't any occasion for any hear-

ing, and Mr. Glasgow, reading from page 66 of the brief and page 31 of the record, Mr. Glasgow turned to Mr. Fletcher and said, "We rule that this rate to Alpena and Cheboygan are the same." (Reads further.)

And then the Commission acting upon what Mr. Fletcher said to them that it was not a bona fide change, after having it filed in their office, published and accepted by them, went on with a hear-
164 ing that they had no legal foundation whatever to bring on.

There was no complaint before the Michigan Railroad Commission, and we raise that question here; the complaint that had been made charging a discrimination between Alpena and Cheyboygan we had equalized that, and there was not any discrimination; the railroad commission knew it; and yet, if your Honor please, with that rate equalized, and complying with the request of the commission, they went on with this case, the last leg of which is here before your Honor today. And that question was raised. We said that they had no right to go on with the case, that the rate had been equalized, there was nothing before them; and they went on with it.

Now, with us in this case I say as a matter of law that the Railroad Commission had no right to go on with that complaint, and I will call your Honor's attention to the very act under which they were acting at that time on page 37 of the Act.

Now, it was said by somebody that the Commission could act upon their own ini-iative, somewhere during this controversy that has been said; that was the only excuse that ever was given for their acting upon a complaint that had been absolutely wiped out before the time of the hearing, two days before the day of the hearing, and the law says, section 89-*c*, "Whenever the Commission shall believe that any rate or rates, or charge or charges, etc." before making such investigation it shall present to the common carrier a statement in writing setting forth the rate or rates or charge to be investigated, and thereafter on ten days' notice to the common carrier of the time and place of such investigation may proceed to investigate such rate or charge in the same manner and make like order in respect thereto as if such investigation had been made upon complaint."

165 Now, it was not shown in this case and it is not here today, and it is our claim that there was never anything before the Michigan Railroad Commission upon which they could have based the orders they made in this case; they never served any notice on us, and they went on a complaint that was absolutely equalized two days before the hearing was had before them.

Now, the Commission made their orders, we went and had our hearing before the Commission in spite of that fact, and these orders you have heard. Now, we say this to your Honor, and as I go along I will discuss matters of our defence, the Railroad Commission made these orders, but the Railroad Commission possessed no judicial powers or functions to enforce their orders. We had a right to appeal, and that brings up the question that Mr. Clark discussed here about penalties, as in double damages, which will be discussed later on in arguments of the law. Decisions will be shown your Honor that the most ridiculous position that anybody could ever ask in a court

of justice is to say that where the law gives you a right to appeal your case that you can afterwards be penalized in double damages for doing what the law said you could do. That would be a fine condition of affairs.

The Court: That is, before you exhaust your legal remedy, you should be doubled up on?

Mr. McNamara: Yes. Mr. Clark's contention here is because this act gives the right to appeal and because we did not comply with the Railroad Commission order at once and not avail ourselves of the right to appeal from what we consider to be an unjust order that therefore the law should penalize us in double damages.

166 Mr. Clark: You could have given the rate effect while you were appealing.

Mr. McNamara: Why didn't you compel us to give it.

The Court: Did not the Supreme Court dispose of that question when they were asked to double the damages?

Mr. McNamara: They were not asked to double the damages. Other courts have discussed that. All these questions are new questions here, that are entirely new, this is one of them.

The Court: What I meant, they would not punish for contempt because you did not put the order into effect?

Mr. Clark: The contempt proceeding had nothing to do with that feature of the case.

— McNamara: The writ of mandamus, after the Supreme Court in July—or after the 10th of August, 1914, when we were served with an order of the Court in a mandamus proceeding we attempted to place these orders into effect, but we could not get any order that would suit the Railroad Commission and the intervening defendants in this case, and because we would not allow them to go to work and take out their refund when they were paying the freight they had us arrested for contempt of court. They said they had a right

167 to take out the refund before they shipped the manufactured product. We said a refund meant exactly what it said it means, a refund. How could we refund to them something we never had? And that matter was taken before the Supreme Court, and it was true the reason why the tariff was not put into effect after the mandamus proceeding was on account of the technical actions of the intervening defendants and the Railroad Commission in conjunction with them, that is the reason, and they wanted to skin this Railroad, they did not even want them to have the advance rate that was given them by the Railroad Commission; they wanted to take it in the first instance, and the Supreme Court afterwards practically said we had a right to recover, and we did recover.

Mr. Clark: Is there any protection for me for my loss of the opening argument? I have lost it now.

Mr. McNamara: You have not lost anything up to date that I know of.

Mr. Clark: I would ask counsel to confine himself to the opening statement.

Mr. Baker: You can settle that by treating this as a motion to dismiss.

Mr. McNamara: I have said to the Court and will say to counsel that in making this statement, as I come to any of these facts where these questions arise as bearing on these facts I am going to elucidate them to the Court at that time.

Mr. Clark: Well, I will ask the Court to fix the limit where
168 the opening statement ends and the opening argument begins.

Mr. McNamara: You can have as many arguments as you like.

Mr. Clark: I don't like to poison the mind of the Court, or attempt to do so, by giving a great many misstatements.

Mr. McNamara: I am giving no misstatements, and I object to that language. What I am giving is the absolute fact based on the records in this case and decisions of the Court, and you have no right to say that I am misstating anything.

Mr. Clark: Well, I think you are.

Mr. McNamara: Well, I think you are entirely wrong when you say so, and I don't want to characterize it any stronger. Mr. Clark does not like to hear facts that he left out of his opening statement elucidated here.

Mr. Clark: You make an argument before you put your proofs in, not only taking the opening argument that I ought to have, but having it upon things that are not in the record, which I object to and will continue to object to.

Mr. McNamara: All right. Now, if your Honor please, the railroad commission made these orders, and I want to call your attention to that part of the double damage section that Mr. Clark thinks your Honor ought to double the damages under. Speaking of this very Act itself, "If any common carrier shall do or cause to
169 be done any act prohibited or declared to be unlawful"—if we were doing any unlawful act in appealing this case it provided for it and we did so.

Now, the Railroad Commission's orders were made, as your Honor has heard, on the 19th of October, the 22nd of October, and then the one on the 4th day of November, and that shows, if your Honor please, and what we were up against all the while from the Railroad Commission.

Why, they did not give us even a right to be heard on the mandamus—and we have always contended that the Railroad Commission didn't have any right to say to us that we shall give a refund of $.50 a thousand under a certain tariff. We have a right to give that if we want to for the purpose of inducing people to reship their stuff by rail, but the Railroad Commission never had any right to tell us to do it, and never had any legal right to impose that burden on us without our consent, and we never had an opportunity to be heard on it, and after they published their orders they came out with a supplemental order, when they heard their orders were not any good, two weeks afterward they came with the supplemental order upon which we never had an opportunity to present one fact or have any hearing before the Railroad Commission.

Now, we availed ourselves of the right and I filed a bill of complaint in that case. I filed it in the Wayne Circuit Court. When

I filed the bill of complaint I attached to it—knowing how finicky the Railroad Commission would be if I attempted to get an injunction without notifying them about it—wanting to be fair and have a fair hearing on the matter—I did not ask for a notice at that time, but attached an order to show cause. That is on page 123. I call your Honor's attention to that date. Mr. Clark, who was
170 so very fair in this case, did not feel inclined to put in the injunction.

"On reading and filing the bill of complaint in this case, and on motion of James McNamara, solicitor for plaintiff in this case, it is ordered that the defendant, Michigan Railroad Commission, shall cause, etc."

That was signed by Judge Mandel, and proof of service of that in this case as made by myself is found on page 151 of the record.

Now, on the 24th of November this matter came up before Judge Hosmer in the Wayne Circuit Court, and Mr. McGill, who was very active in supporting my brother in this case—Assistant Attorney General at that time—appeared for the Railroad Commission, and when the matter was called by Judge Hosmer, Mr. McGill said that Judge Bird, who was in Washington on a case, wanted to be present at the hearing on this injunction; that he was very much opposed to having injunctions issued in matters of this kind, and he argued very strenuously with Judge Hosmer that the matter go over for one week until such time as Mr. Bird could be present in person to make an argument in resisting the application for an injunction in this case; and I told Judge Hosmer that I had no objection whatever to adjourning the matter for a week, but that the Michigan Railroad Commission orders under the law of this state would become effective within 30 days unless I had an injunction restraining them from putting them into effect, and that I wanted an injunction and the injunction could be issued and then the matter could stand until the 2nd of December, and if the Court after the argument between Judge Bird and myself concluded that the injunction should not stand he could dissolve it, and then Judge Hosmer, if your Honor please, issued the following
171 injunction, on page 152 of this record. (Paper read.)

That injunction was issued that day, if your Honor please, and on the morning of the 2nd day of December, to which this matter was adjourned, Judge Bird came to my office before court hours—Attorney General Bird—and he came in and sat down and asked me what all this matter was about that he was to appear over in the circuit court; and I told him—went over the matter with him—and when I got through he said "I am not going to permit them to start on the D. & M. Railroad on the rate question first; I am in entire sympathy with your defense in this case, and you may make out a stipulation that that injunction can be made to stay in force and effect until the final determination of this case," because I told them I was going to bring it to the United States Supreme Court, if necessary, and I made a stipulation and it was submitted to Judge Bird and he signed it on the 2nd of November, 1909, that the injunction that was issued by Judge Hosmer should stay in full

force and effect until the final determination of this case upon its merits.

Mr. Clark: Will you read that stipulation instead of stating it?

Mr. McNamara: "It is hereby stipulated by and between the attorneys for the respective parties hereto, etc."

And when this case was tried before Judge Murfin, when Judge Murfin gave his decree in this case and we served notice of appeal on him and the matter was brought to his attention, the stipulation was brought to his attention, he said then, "Why, this injunction, how can this injunction be dissolved in this matter
172 as long as they have given notice of appeal?" And I said to Judge Murfin, "Is your decree in this matter the final determination of this case upon its merits when we have given you notice we are going to carry it to the Supreme Court of this state?" and he said "No." And I want to say here now, and I say it advisedly, that the other side in this case went to Judge Bird when this case was tried in the Supreme Court of this state, when he could not sit on it, and they tried to get him to make an affidavit in this case to say that the trial that he contemplated when he signed that stipulation was a determination by the Supreme Court of this state, and Judge Bird would not do it, as giving you what Judge Bird thought about this matter at that time, and Judge Bird would not make affidavit or showing of that kind.

Now, what do they mean by an injunction in this matter, and stipulation by Judge Bird that this matter should be suspended. What are you suspending? The injunction says you shall refrain and desist from putting into operation or making effective these three orders. What do you mean by making effective these three orders?

Do you mean to say, if your honor please, under a stipulation of that kind, those orders were in force and effect and had any legal force and effect? Under the Railroad Commission *act*, if your honor please, Judge Bird is attorney for the Michigan Railroad Commission. Let me read you the exact language; "The Attorney General of Michigan, or any prosecuting attorney selected by the state Commission in any county where said action is pending shall be counsel in any proceeding, investigation, hearing or trial."

The Attorney General was the man selected by the Commission, he appeared for the Commission, he signed the stipulation
173 for the commission, the commission had power, if your Honor please, to suspend their orders, didn't they? Is there any doubt of the Michigan Railroad Commission under the railroad commission act or law of this state to suspend their order. They had a right to sign a stipulation of that kind and say you can go on and defend this case and we will agree that these orders be suspended until the final determination of this case upon its merits, nothing to prevent their saying that, they are suspending orders every day; and only the other day on the complaint of the Fletcher Paper Co. themselves, one of the people in this case, they suspended one of our orders down there.

Now, if they had a right to do it, didn't their attorney have a right to do it, couldn't he do it for them. If it is in this case that that stipulation is before this Court with the same force and legal effect as though it were signed by the Michigan Railroad Commission themselves it binds the Michigan Railroad Commission, it suspended this order, they were prohibited from putting into force and effect until the further order of the Court until this matter was heard and finally determined upon its merits. Now, they are asking your Honor in this case to say that the final determination of that case was when? Why, you heard Mr. Clark tell about throwing an anchor to windward in one of his statements, he was very careful in making the computation in one of his exhibits, and I asked him what he meant by his periods; his first period for interest is when the matter was decided by Judge Murfin, his second is when it was decided by the Michigan Supreme Court, and when it was decided by the Federal Court is the third, and his fourth period is when the decree of the Court or order of the Court
174 was put into effect under mandamus proceedings, and the fifth was the final decision of the Supreme Court of the United States.

In this case at what time was there a final determination in this matter upon its merits? Was it before Judge Murfin? There wasn't any determination upon the merits at that time, was there, and this injunction was in force and effect. Was it at the time the Supreme Court of Michigan decided this case on the 22nd of July, 1912? No. Why? Because there was not a final determination of it on the merits at that time either.

And I want to call your Honor's attention to another thing in connection with that. We had to go into the District Court after the determination of this case upon its merits, as they call it, and the Supreme Court decision on the 22nd of July, 1916—I prepared a bond on an appeal and I made an application for a writ of error to the United States Supreme Court and I expected it would be given me as a matter of course, and I went down to Lansing with it and I presented it to Judge Moore, who was then Chief Justice of the Supreme Court, and Judge Moore sent word for me to meet him the next morning and I came the next morning before all of the judges in their consultation room, and Judge Moore said he thought if we were going to appeal this case that we ought to put these orders into effect now, that they had decided that the orders of the Michigan Railroad Commission were all right, and that if we did that they would grant the writ of error. I said to Judge Moore, "No application has been made, the Railroad Commission act provides how that can be done." During all this time, if your Honor pleases, no application was made by these defendants here at all, by Messrs. Gillett & Clark to put these orders into force and effect by
175 the very means that is provided here in this law. This act says these orders can be put into effect by mandamus proceedings, but during all this time, from November until July 22nd, 1912, no effort was ever made and no motion ever made by them to put these orders into effect by the very vehicle that is provided

under this law. This is a chancery proceeding, if your Honor pleases, under this Act. These people had been guilty of laches, they have slept on their rights during all this time, they could have made a motion at any time to have dissolved this injunction; they could have made a motion at any time to the Supreme Court to compel us to put these orders into effect, and now, having slept on their rights, they say that your Honor ought now to compel us to pay as a penalty for their own negligence damages, and double damages besides:

Judge Ostrander said: "I wrote the opinion in that case and I am perfectly willing that you should have your writ of error to the Supreme Court of the United States," and they adjourned the matter until the afternoon and I went back in the afternoon and Judge Moore said: "If you will put up a bond for a hundred thousand dollars, conditioned that from and after the decision of this Court, that if you should lose in the Supreme Court you will pay them the excess between our decision and the decision of the supreme court, a $100,000 bond as indemnity, I will grant you the writ of error." And I said, "We deny their right to recover, Judge Moore, at any time until these orders are put into effect, and the law of this state provides how they shall be put into effect, and they have not done that, and we deny that they have any right to recover between your decision and any decision that might be rendered adversely to us in the United States Supreme Court,
176 and I cannot give you any such bond as that." And he would not give me the writ of error.

Then Mr. Baker went up to see Judge Day, who was at Mackinaw, and he was good enough to notify the other side that he was going up there—Mr. Fletcher and Mr. Gillett—to have them there with him; and Judge Day denied, at that time, the writ of error, because we had made an application to the Supreme Court of this state and they were willing to grant the writ of erro, and he did not like to interfere on that account. And then we started this case in the United States district court and it went from there to the Supreme Court.

The Court: Wouldn't it be just as well, if I might make the suggestion, so that Mr. Clark could follow you, that if you wanted to take up the question of the double damages now and settle that question——

Mr. McNamara: What I am intending to do, at the close of my argument, after speaking of what I consider of value to the Court in understanding our position, together with the law on the points I am raising, I shall make a motion to dismiss that will bring the whole legal argument before your Honor.

The Court: Of course, Mr. Clark will have to be heard on that.

Mr. Clark: The question of double damages would have to come after the verdict.

The Court: Yes, I understand that.

Mr. McNamara: Your honor will see that this injunc-
177 tion by its very terms and by the prayer for relief in our bill of complaint, we asked that the Railroad Commission

be enjoined from putting these orders into effect, and the injunction that we received said that they should not be put into effect and should not be made effective. If an order hasn't any force and effect, why, then, you cannot recover on it. Can you recover on anything that has no force and legal effect, that is not in effect legally? How can you? If they are enjoined from making them effective, then they are not effective. There is nothing that can follow more logically than that, and there is nothing more logical than that from the time this injunction was issued until your honor will find somewhere in this case where the final determination of the case upon its merits, there can be no recovery in this action of single damages, let alone double damages, because they are seeking to recover here in this court on orders that must have been legally effective at the time they are asking to recover, otherwise they could not recover. Now, if they were not legally effective at these different periods, how can they be said to recover in this action, if their order was not legally effective on February 11, when Judge Murfin decided this case? And when we appealed from his decision to the supreme court, how could they recover during that period if they were not legally effective on July 22, 1912, when the supreme court of this state decided the main issue.—Understand, your honor, that the scupreme court of this state did not put these orders into effect at the time that it rendered its decision in the main case—they simply affirmed the action of the Railroad Commission in making these orders, that is all they did. No one up to that time had made any attempt to have orders enforced, and no attempt was made up to that time, and the decision of
178 the supreme court had no effect on that part of it at all, except to give judicial validity of the orders of the Railroad Commision.

The Court: If there were no stipulation signed by Attorney General Bird what would be the status of the matter then?

Mr. McNamara: Well, supposing after the issuance of these orders on the part of the commission we had never filed a bill of complaint, supposing we had never appealed from these orders, we did not put them into effect, we just went along about our business same as we did before, collecting under these orders and these gentlemen stood around and paid no attention whatever to this matter until the 22nd of July, 1914, five years and a half afterwards—four years and a half afterwards—made no effort whatever under the law to put them into effect, and when they applied to the supreme court of this state for a mandamus and it was granted on that date, would your honor say they were entitled to recover during that time when they had not availed themselves of the plain provisions of the law and had these orders put into effect? That law provided, and I call your honor's attention to it at this time, on page 50 of the railroad law, section 47, "In addition to all other remedies," etc.

Now, was there anything in this case to have prevented these people during that time, if we had never filed this bill of com-

plaint, or had never got out an injunction, and supposing the injunction had been refused——

The Court: Well, suppose there was an order made today by the Railroad Commission that becomes effective in how many days after service?

179 Mr. McNamara: They gave us thirty days in which to put it into effect.

Mr. Clark: Twenty days, it becomes effective in its own——

The Court: Then your contention is if they ignored that order they have to go into a court of chancery to make it effective?

Mr. McNamara: Why, they have got to; they can't help themselves.

The Court: Well, go ahead. I did not mean to interrupt.

Mr. McNamara: Now, the Railroad Commission does not possess any judicial powers or function; they cannot put their orders into effect; they cannot even make an order; the Railroad Commission cannot make a tariff; they have no power to make a tariff. All they can do is direct us to do that. They can make an order directing us to make one and then tell us to put that into force and effect, but it does not become effective until it is published under the law provided for under the Railroad Commission. This law provides how a tariff shall become effective; but to get back to the other phase of that in this case, as your honor suggested, supposing during this time, all this five years, these people made no effort whatever to avail themselves of the plain provisions of this statute to put this order into effect, because in mandamus proceedings to put this order into effect we have a right to be heard, they cannot put an order into effect; they cannot move the legal ma-

180 chinery of this state to put an order into effect without giving us an opportunity to be heard; and we have a right to be heard on that even after the Railroad Commission directs us to do this thing, and in a court. Now, if they stood around for four or five years and never attempted to make these orders effective, and — is only one way to make them effective, is any court in Christendom going to say that because of their laches in not doing this thing, that we ought to be penalized for it, and is any court going to say an order is effective when it is not effective? That is the idea. When is an order effective? The law provides precisely, and I will call your attention to it. (Reads.)

Now, that provides that subject to the provisions of this act, and in order to make the tariff effective we have got to file with the Railroad Commission a schedule just as they compelled us to do in the latter end. After the mandamus proceeding was undertaken by these gentlemen on the other side and when the court gave the order for us to put this rate into effect, why, then we had to prepare a tariff schedule, we had to write out what the tariff was, and we not only had to post it in our own offices so that all the public and anybody shipping that wanted to inquire and find out what the tariff was could come in and see what it was, we not only had to do that but we had to put it on file with the Michigan Railroad Commission and they had to accept it and put it into their file, and

there is some difficulty to get a rate on file, as the contempt proceedings will show; because we made several attempts to file a tariff that was not satisfactory to the Michigan Railroad Commission and that is what brought about the contempt proceedings, but they have got to accept it themselves, we have not only got to publish and print it—I want to show you how technical these gentlemen were on the other side. The first one, in order to avoid
181 trouble or the idea of going into court, we had the first tariff typewritten, posted it up in our offices and all along the road, and sent a copy to the Michigan Railroad Commission to file, and they started contempt proceedings saying that a typewritten copy was not sufficient, that we ought to have it printed, and then we had to print it. Now, in order to have a tariff that is a tariff, under which a shipper can be protected, it has got to be on file in the Railroad Commission office, and it has got to be on file in all our offices, and until such time as it is put on file in our offices and accepted and filed in the Railroad Commission it is not effective under the law of this state and never can be. Now, it is some trouble to change the tariff. That is what they wanted us to do, change a tariff. Section 67 provides that no change shall be made in a schedule of rates or fares which have been filed and published by a common carrier in compliance with the requirements of this section except after ten days' notice to the commission, etc., that the time when such change will go into effect and such rates and charges shall be discontinued without giving notice as required for changing these rules.

Why, in order to change this tariff we would have to give this notice, the public is entitled to some protection. The Michigan Railroad Commission is merely a creature of the legislature created for the purpose of making uniform rates for everybody, some that Tom could not have one rate, Dick another, and Harry another, but it said you shall publish in all your depots along the line of your railroad schedules showing a uniform rate for carrying such and such a thing, but not only shall you do that, but to know it is going to be the right rate you have got to file it with us and
182 with the Interstate Commerce Commission, also, if your honor please.

Now, was that ever done in this case? The only time this rate was ever put into force and effect, the only time it ever had any legal force and effect under the law, was the 18th of February, 1915, when it was published, printed, put up in our depots, filed and accepted in the Railroad Commission's office. It could not have been an effective rate any other way. That is entirely outside of the injunction that protects all this time until the final determination of this case upon its merits.

The Court: Your claim is it could not be dated back to the order of the commission?

Mr. McNamara: No, your honor. A rate has got to be in effect before it is effective. Take the question of tender that my good friend has taken up some time in proving. I state to him and say to this court frankly that that tender cuts no figure here one way

or the other, and I will tell you why. The only rate that was in force and effect under the law of this state or filed with the Railroad Commission, printed and on file in our offices along the line of the railroad, was M. R. C. 205. If we had gone to work and accepted the tender of the Richardson Lumber Company, Churchill Lumber Company, and those other gentlemen, and given them a less rate, what about the other fellows? They are not the only people that live in that part of the country and that deal in lumber, there is a thousand and one little farmers that get out logs down there, that bring them down to the railroad and sell them, and sell them to these men. What about these people that ship logs? Aren't they entitled to some protection. Could we give these people a rate because they made us a tender and then charge the
183 smaller lumber operators the original rate on file in the office? If we had done that, if your honor please, we would have violated the law of this state, which says distinctly that no carrier shall charge either through his agents or anybody else any rate except the published rate that is on file in his office and on file in the Michigan Railroad Commission's office, and if he does he would be guilty of a misdemeanor and fined $500 and sent to jail, that is what the law says.

Now, I call your honor's attention to the change of rate, and this formula had to be gone through, all this red tape, it is not enough for the Michigan Railroad Commission to say that we make an order and direct that you put that into force and effect within twenty days, that is all right enough, but they have no power to compel us to do that and the law recognizes that. Suppose on the other hand this injunction was refused to us and these gentlemen had availed themselves of the plain provisions of the law and had asked for a mandamus to compel us to put these rates into effect and they were put into effect at once, and supposing, if your honor please, that we went through this litigation to the supreme court of the United States during all these five years and we had prevailed there, where were we going to recover any money back? We would have been met in this court by my very learned friend who would have said, "Why, the only rate that was in force and effect, the only legal rate, was the rate we paid; we cannot pay you under some contemplated rate, we paid the only rate we could pay, and we are protected under it"—and they are protected under it, if your honor please. They paid the rate that was on file, that is what they paid, and every man who shipped a log into Alpena was protected under the law
184 by paying that rate that was on file and on file in the Railroad Commission office, and we could not recover a dollar, and the only value a victory to us in the supreme court of the United States would have been to establish that rate from now on for the future. There is no doubt of that, if your honor please, any more than it is that twice two is four.

What tariff was in force and effect all this time until the 18th of February, 1915? Here is a provision of this law that says we shall not collect except on a tariff that is on file at the time when the carriage is demanded by the shipper, and the only tariff was on file

at that time was M. R. C. 205, and M. R. C. 205 was the only legal tariff in force and effect on the D. & M. Railroad between the shippers and carriers up until the 15th of February, 1915. What benefit was it for these gentlemen to have made a tender in this case when under the very provisions of that law the only tariff that was in force and effect was M. R. C. 205?

Now, we claim in this case, and I will state our position that we are taking in this case, and authorities will be presented here to cover these positions—the position here in this case that there was no final determination of this case until this order was finally put into full force and effect on the 15th of February, 1915. There are several periods here that Mr. Clark has mapped out for consideration, and can your honor say there was a final decision in this matter in the hearing before Judge Murfin? What does a final determination mean? It means to finally determine in the matter. We appealed from his decision to the supreme court of Michigan. Was it finally determined there? No, because we got a writ of error to the United States supreme court. It was finally determined there, if your
185 honor please. In the meantime they had started mandamus proceedings and these mandamus proceedings to compel us to put these rates into full force and effect were complied with on the 18th of February, 1915, and we claim that under none of these periods did any right of action to recover for any such excess paid accrue to any of these defendants. Now, our position is this briefly, that prior to the passage of the Railroad Commission Act of 1907—in 1907 the only redress that a carrier had for an excessive freight charge was an action in court, and you might have just as many charges as you would have actions and as many rates as you would have different juries and judges, and it was for the purpose of unifying these things and for a uniform rate that the act was created in this state.

Now, after they had created the act of 1907 they abolished the common law right to go to court in the first instance to sue for an excessive charge. You had to go with your complaint to the Railroad Commission, every body had to, and then, if your honor please, in 1909 they added to that act, after revoking that part of the act of 1907, they added to that act a part for reparation, and that part I will read to your honor. (Quotation read.)

Now, that provided in addition what is called reparation, and it is copied from the Interstate Commerce Commission act, and in that we take the position here that it became the duty of these defendants in this case to have gone before the Michigan Railroad Commission to have their reparation made, to have this matter brought before the Michigan Commission, and give us an opportunity to make whatever defense we had to make, and then if the Railroad Commission found that we excessively charged them during this period they would make a finding to that effect, present that finding to us, if we paid it, well and good, if we refused to pay it, then, if
186 your honor please, they have a right to come into this court and bring suit on that, and we cannot be heard then on that action to make the other defense because the findings of the

Michigan Railroad Commission is prima facie evidence of the fact that such charge was excessive.

Now, we say, if your honor please, that that abolished the common law right of these people to come into this court the way they have come in in this case, and bring an action of this kind without going before the Michigan Railroad Commission. They should have gone there first before they came into this court, and not having done that, they cannot maintain this right of action because they cannot accept part of this and reject the other part; they cannot go before the Railroad Commission with a complaint and direct us to put in a lower rate and then avail themselves of the common law right of action and come in here and say, without going before the Michigan Railroad Commission for reparation, because if they had, if your honor please, if they came into this court under the common law in this case as they have, then we say we have the common law right to come in here and make the defense that the tariff complained of was not excessive, was not exorbitant, and was not discriminatory in any form, shape or manner, and we would have a right to go into the whole question. That is one of the things we claim here in this case.

Now, there is another thing, your honor we will show when we come to the examination of this record that the last day that any testimony was taken in this case the day on which the testimony was closed was the 15th day of August, 1910.

The testimony taken upon which the Railroad Commission based its order ended on the 15th of August, 1910. There was no
187 other testimony since that before the Railroad Commission, as the basis of these orders. There has been no other testimony taken in the case since that day. We have never had a day in court since the 15th day of August, 1910. We never had an opportunity since the 15th of August, 1910, to come before a court of competent jurisdiction and show them the changed conditions that have occurred up here on this railroad, that we have never had an opportunity to produce a witness to show that rates based upon testimony that ended on the 15th of August, 1910, are confiscatory under the changed conditions that existed in 1915 and 1916.

Since the 15th day of August, 1910, everything that goes into the operation of this railroad, if your honor please, has almost doubled in value, wages of all operatives have been increased, the price of everything from a spike to an engine has almost doubled in value. Your honor will remember since the testimony was taken in this case one of the largest cities, one of the most thriving towns, one of the best freight feeders that the D. & M. had was entirely wiped out by fire, Oscoda and Au Sable, and a loss of over a hundred thousand dollars to this railroad, taking away from it one of the best freight feeders it had, and we say we have never had an opportunity to show that. Is your honor going to say that if we could have produced that testimony before the court at that time or since then, that these orders that we are seeking to recover on would be held legal and would not be confiscatory? It is a small thing, when you go through the decisions of the judges in the courts and follow

up the decisions in this case, to find out how small a thing they sustained these orders upon, and we claim that this case under the changed conditions to show all of these changed con-
188 ditions, to show that what was not confiscatory under testimony that closed at that time is confiscatory now, and that these gentlemen have not any right to recover for orders at this time. And they will say you go before the Railroad Commission at any time, but we could not do that. The law provides we cannot make a change for two years, and besides that this was in litigation all of the time up until the 15th day of February, 1915, and as soon as we could after the orders were put into effect then we did not go into court and petition the Michigan Railroad Commission for an increase of rates, and that is being heard now by the Michigan Railroad Commission.

Now, these are the things that we make as a matter of defense in our case, and on which other counsel engaged in the case with me will present the law bearing on these points to this court, and I wanted in opening this case to give the court not only a chronological history of this case, but a historical review of the conditions that existed at that time and up to the present time, together with the points we rely on in our case and in support of that, if your honor please, upon all these points I now make a motion that for the reasons stated by me, for the purpose of bringing up these points, that these cases be dismissed on the testimony taken by the plaintiff.

Mr. Baker: In support of that, your honor——

Mr. Clark: Mr. Baker is now making an argument in support of this motion, I presume.

(Mr. Baker here argued to the court.)

Court here adjourned until tomorrow morning at nine o'clock.

189 SEPTEMBER 22, 1916.

Mr. McNamara: When I made my motion to dismiss yesterday I had some papers to read into the record in support of that motion, and I would like to do that now, showing what we rely on:

1st. The rates fixed by the Michigan Railroad Commission's orders of October 19th, October 22nd, and November 3rd, 1909, (specified in the plaintiff's declaration), are unreasonable, illegal and confiscatory in that said rates are not sufficient to cover the cost of hauling logs and other forest products in carload lots from logging branches of the said defendant railroad to the city of Alpena, and logs and other forest products in carload lots and otherwise between said city and Broadwell's dam, and that said rates have been shown by practical experience to seriously impair the net profits and income of said defendant.

2nd. That said rates violate the provisions of the fourteenth amendment of the constitution of the United States, in that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

3rd. That the orders of the Michigan Railroad Commission set forth in the plaintiff's declaration as of date of October 19th, October 22nd and November 3rd, 1909, were not in force and were inoperative and non-controlling until the 15th day of February, 1915, at which time said defndant issued its tariffs, making such rates and orders operative.

4th. That on and after said orders were made by the Michi-
190 gan Railroad Commission and between the dates of the several orders so made, the conditions prevailing on and along the various lines and tracks of defendant's railroad became and were changed in that the forest products constituting the subject matter of such orders fluctuated and became and were depleted and non-available for railroad transportation. Had such changed conditions obtained at and prior to the making of such orders different and higher tariff rates would have been made and would have been approved by the courts in their decrees, orders and determinations.

5th. That by reason of the changed conditions as to forest products along and tributary to the various tracks of the defendant's railroad since the proofs were taken upon which the orders heretofore referred to were based, and by reason of the increased cost of operating the defendant's railroad, including the increased cost of materials, labor, maintenance and every other thing connected with the operation of the defendant's railroad, taken in connection with the fact that the defendant, relied upon its published tariff; the giving effect to the orders above referred to from their dates, instead of from the date of the making and posting of the tariffs thereafter, pursuant to court orders, would operate as confiscation of defendant's property, resulting in a contravention of the spirit as well as the letter of all statutes and other laws controlling the operation of defendant's railroad.

6th. That the giving effect to the said orders of the Michigan Railroad Commission from their dates would constitute a discrimination in favor of the plaintiff in this suit and against all other shippers
who accepted and were controlled by the rates and tariffs
191 posted and published pursuant to the statutes in such case made and provided.

7th. That the said orders of the Michigan Railroad Commission were in no wise controlling upon the defendant and were wholly inoperative until the final determination of all litigation relative thereto by virtue of a stipulation duly executed by the representatives of all parties interested, and relied on by this defendant, said stipulation bearing date December 2nd, 1909, entitled in the cause and reading as follows:

"It is hereby stipulated by and between the attorneys for the respective parties hereto, that the application for an injunction and the order to show cause made by said court and the hearing thereof, may be and is hereby continued in its present state until the final determination of said cause upon the merits thereof.

Dated this 2nd day of December, A. D. 1909.

JOHN E. BIRD,
Attorney General.
JAMES McNAMARA,
Solicitor for Complainant.

It being the purpose of the attorney general and the attorney for this defendant, the Detroit & Mackinac Railroad, that said stipulation should and did operate to continue in full force and effect all posted and published tariff rates for the transportation of forest products until by an order of the court of last resort said defendant should be required to post and publish other or different tariffs.

8th. Pursuant to said circuit court rule 23 the defendant now here admits that on, to-wit, the 23rd day of November, 1909, and on the 11th day of March, 1909, and on the 24th day of
192 April, 1909, certain parties filed three several petitions and complaints against this defendant with and before the Michigan Railroad Commission, therein alleging that they, the said complainants, considered themselves aggrieved by the asserted unfair, excessive, unreasonable and discriminatory rates, imposed upon them by the defendant with respect to the shipment and carriage of forest products that thereafter said Railroad Commission issued three several orders or findings set forth in the declaration of the plaintiff hereinbefore referred to as orders dated October 19th, 1909, October 22nd, 1909, and (supplemental order) November 3rd, 1909, which said orders purport to have been made pursuant to Act No. 300 of the Public Acts of Michigan for the year 1909; this defendant now here expressly denies the allegations in the plaintiff's declaration that by virtue and reason of the issuance of said orders the said Michigan Railroad Commission "promulgated" and "gave effect" to such orders, and expressly denies that the allegations in the petition referred to warranted such orders; the defendant respectfully refers to its several answers made and filed to such petitions.

9th. This defendant admits that, conceiving itself aggrieved by such orders, filed its bill of complaint in the circuit court for the county of Wayne, in chancery, pursuant to the statute in such case made and provided, for the purpose of reviewing all proceedings before then had in connection with such orders; that from the decree made therein by the circuit court for the county of Wayne, in chancery, defendant appealed to the supreme court of the state of Michigan, and thereafter instituted proceedings in the district court of the United States for the eastern district of Michigan for the purpose of further reviewing the proceedings before then had in con-
193 nection with such orders; it, the said defendant, thereafter appealing to the supreme court of the United States from the order and decree made by said district court. That thereafter said plaintiff applied to the supreme court of the state of Michigan for and obtained a mandatory order of date February 18th, 1915, by the provisions of which said order the said defendant was required to and did publish, post and put in operation the freight tariff referred to in the plaintiff's declaration.

This defendant alleging that from the time of the filing of the three petitions hereinbefore referred to until the issuing of the mandatory order on the said 18th day of February, 1915, the subject matter of said petitions was in process of litigation and that by virtue of the proceedings so had and taken by virtue of the stipulation hereinbefore referred to and particularly set forth, and by

virtue of the statute and laws controlling the same, it, the said defendant, lawfully and rightfully operated its said railroad and transported forest products according to the published tariff, and was not required during said time to transport forest products according to any other or different tariff or rates than the one so posted and published as aforesaid.

10th. That during the time which elapsed between the findings and orders of the Railroad Commission, aforesaid, and the posting and publishing of the new tariff on the 18th day of February, 1915, no proceedings were had or taken by or in behalf of the plaintiff to set aside or annul the stipulation hereinbefore set forth in detail, nor to require this defendant to make, post or publish any other or different tariff of rates for the transportation of forest products than that by which it was lawfully controlled during said time.

194 11th. That on, to-wit, the 3rd day of November, 1909, the Michigan Railroad Commission made said supplemental order in the cause entitled F. W. Gilchrist, Churchill Lumber Company, Island Mill Lumber Company, complainants, (D-188). That by the terms of such order it was provided as follows:

"This order may be rescinded, altered or amended at any time when in the judgment of the commission such action should be taken."

From the date of said order until the final determination by the court such commission has never exercised its judgment to the end that such order has been or could be rescinded, altered or amended; said commission not having been petitioned to so rescind, alter or amend said order by reason of the uncertainty of the final determination of the issues so being litigated and for the further reason that no tariff of rates had been made, posted, or published pursuant to such order; defendant therefore insists that by the express provisions of the Order, the same did not and could not become effective and operative as against the said defendant until the final determination of the litigation and the posting and publishing of the tariff as aforesaid.

12th. That the plaintiff did not re-ship over the defendant's railroad the manufactured product of the forest products shipped to its mills by the said defendant entitling the said plaintiff to the sum of fifty cents per thousand feet upon all forest products shipped to the plaintiff at Alpena as alleged in the Declaration of the plaintiff.

13th. In event said Commission's Orders shall be adjudged efficacious, defendant alleges that pursuant to sub-division (*g*) Section 10, Act No. 300, Public Acts of 1909, the said plaintiff

195 should have complained to the Michigan Railroad Commission asserting that the defendant had exacted for the transportation of the forest products irregular or exorbitant charges and the said plaintiff should have so complained (or petitioned) within six months from the date of such transportation; that by virtue of said law the said plaintiff could not institute proceedings for the recovery of irregular or exorbitant charges exacted at a time more remote than six months from the making of such Complaint,

and therefore, the plaintiff cannot recover the demands made by it in its Declaration and Bill of Particulars.

14th. That no proceedings have been had or taken by the plaintiff before the Michigan Railroad Commission to determine the amount, if any, of the excessive or irregular rates or charges exacted by the defendant from the plaintiff as alleged in the plaintiff's declaration; that no proceedings at law in the Circuit Court for the County of Bay can be maintained for the recovery of irregular, exorbitant or excessive charges until such amount, if any, has been found and determined by such Railroad Commission, all pursuant to said sub-division (*g*) of paragraph 10 of said Act 300 of the Public Acts of 1909.

15th. The defendant, proceeding in good faith to adjudicate the legality of the said three orders of the commission, could not complain to said Commission pending such adjudication and relying on the determination of the supreme court that the Commission's findings were not conclusive and that they establish no more than a prima facie determination; defendant cannot be required to refund an amount to plaintiff equal to the difference between an established and a posted and published tariff of rates and an unposted and unpublished rate named in orders awaiting judicial approval.

196 16th. That the three several orders of the Michigan Railroad Commission referred to in the plaintiff's declaration as of the dates October 19, October 22, and November 3, 1909, (said orders being heretofore referred to) are void and voidable and cannot be recovered upon by reason of Act 300 of the Public Acts of 1909 as amended, because said Michigan Railroad Commission had no jurisdiction to make and issue such orders, and because the petitions required by the statute in such case did not make the statutory allegations required as a basis for the making of the orders referred to; and because the complaint before the Michigan Railroad Commission, dated April 21, 1909, upon which the orders of said Commission of October 19, 22, and November 3, 1909 were based, charging a discrimination in log freight rates between points south of Cheboygan into Alpena and north of Alpena into Cheboygan, were equalized by a new tariff known as M. R. C. No. 199, which became effective June 1, 1909, and was effective, and equalized, and such alleged unjust discrimination absolutely removed before the hearing had on said complaint, June 3, 1909, and that there was no legal complaint before said Commission upon which to base said orders as aforesaid, and that said Commission was without jurisdiction to make said orders, and the same became and was and are an invasion of the constitutional rights of said defendant and in violation of the 14th amendment to the Federal Constitution of the United States.

17th. That at the time of the making and issuing by the Michigan Railroad Commission of the orders heretofore referred to, designating a tariff of rates, such orders bearing dates October 19, October 22 and November 3, 1909, several certain tariff of rates on freight and forest products into and out of Alpena, being the tariff of

197 rates in force at and prior to the dates of such orders last hereinbefore referred to, and in force and effect, published

and posted pursuant to section 10 of Act 300 of the Public Acts of 1909, and were designated as G. F. D. No. 147, dated Bay City, Michigan, November 20, 1903, set forth on page 447 of the printed record in the so called rate case, and M. R. C. 196, of date January 7, 1909, to take effect January 19, 1909, set forth on pages 448 and 449 of the printed record in the so called rate case, which said tariff of rates had been approved by the Michigan Railroad Commission. Also tariff of rates duly filed, posted and published, designated as M. R. C. 205 and M. R. C. 208 and M. R. C. 201, and all other tariff of rates for the transportation of freight and forest products to and from Alpena city, state of Michigan, posted, published and effective before and after and at the time the Michigan Railroad Commission made their orders of dates as aforesaid October 19, October 22 and November 3, 1909. Such tariff of rates will be offered in evidence and their contents established on the trial of these cases. The purpose of this notice is to comply with Rule 23 of Michigan rules controlling Circuit Court cases relative to defense made by the defendant in this cause. Knowing that the plaintiffs and their attorneys are familiar with such existing tariff of rates, we do not herewith set forth such tariff of rates in detail. If required to do so, however, a copy of such posted, published and effective tariff of rates will be furnished to the attorneys for the plaintiffs at their request.

18th. That the defendant on the trial of the cause above entitled will insist and give evidence relative to all tariff of rates pertaining to the transportation of freight, logs and forest products into,
198 and the manufactured product therefrom out of the city of Alpena aforesaid, from the date of the three orders set forth in the plaintiffs' declarations, and before and after such dates; that said plaintiffs have in no wise proceeded before the said Railroad Commission, nor in the courts to the end that such rates independent of the rates made on October 19, October 22 and November 3, 1909, have been cancelled or have become ineffective until on and after the 18th day of February, 1915.

"And I want to add to No. 16 a further reason, that after the equalizing of the rate of October 19, 1909, made by the Gilchrist Lumber Co., the Island Mill Lumber Co., the Richardson Lumber Co., and Churchill Lumber Co. by the new rate as M. R. C. No. 207, that the railroad commission never served any notice under the statute upon the defendant that any other complaint or investigation would be made by it relative to any of the rates then in force and effect by the defendant company."

Mr. Baker: I want also to read into the record some additional reasons: To hold that the rates fixed by the orders of October 22 and November 3, 1909 were in force before the judicial controversy was terminated by the granting of the writ of mandamus by the Supreme Court of Michigan, July 25, 1914, would be a violation of the due process of law and the equal protection of the law clauses of the 14th amendment of the Constitution of the United States.

The Michigan Railroad Commission is not a court, and it has no power to issue any process or mandate to enforce obedience to its orders, but compliance with the orders of the commission may be

compelled by proceedings in mandamus, injunction, or other appropriate civil remedies.

199 In any such proceedings it would be necessary to give the carrier a hearing and an opportunity to put in evidence and make an argument, and in that way compliance would be had with the due process of laws.

In this case the petition for mandamus was presented to the State Supreme Court, and an order to show cause granted April 23, 1914. The railroad company filed its answer and the case was submitted to the courts June 16, 1914, and the writ was granted July 25, 1914; 182 Mich., 234. A controversy arose over the wording of part of the schedule the railroad company was ordered to file, and a schedule satisfactory to the court was not filed and published until February 18, 1915.

To hold that these rates were in force during all of these years of litigation would be in effect execution before judgment, that is, they would enforce the orders although they had not been finally adjudicated upon.

Offer of Proofs.

Mr. Baker: I want to make an offer to prove, an offer of evidence. I offer to prove that the property of the Detroit & Mackinac Railway Company, devoted to public use, June 30, 1910, was of the value of $5,636,844.86, and on June 30, 1914, it was of the value of $5,709,816.61, and in that connection we will prove that the Detroit & Mackinac Railway Company is entitled to earn on said values at least 8 per cent, and if said values are reduced to the lowest possible estimate at which they can be figured or ascertained it is entitled to earn 10 per cent. We will prove that during the years ending July 30, 1910, 1911, 1912, 1913, 1914 and 1915 down to February 8th, the Detroit & Mackinac Railroad collected three dollars a thousand on logs brought from as far north as Millersburg and three

200 dollars and a quarter a thousand for logs brought beyond Millersburg to Alpena, and that the total shipments were over a hundred million feet, and if the rates fixed by the Commission had been applied the total loss would have been over $136,000 those five years with an additional loss of in the same proportion for the sixth year.

We have actual evidence put in here where they tried to prove—it is a mere question of computation.

We further will show that during said years the Detroit & Mackinac Railway Company in its financial statements and annual reports charged a certain amount to depreciation, which it was required to do as a business proposition, and by the rules and regulations of the Interstate Commerce Commission, and by Section 6553 of the Howell's Statutes, 2nd edition, page 2655. In 1910 the rail depreciation was $73,093.43, steam locomotive, $12,706.56, passenger train cars $11,675.16, freight cars, $34,529.72, work equipment, $668.04, or a total depreciation in that year of $132,662.99. In 1911 the rail depreciation was $60,000, steam locomotives,

$12,373.60, passenger train cars $10,973.60, freight train cars, $32,461.80, work equipment, $627.96, a total for that year of $116,436.92.

In 1912 the rail depreciation was $39,380, steam locomotives, $11,631.12, passenger train cars, $10,316.16, freight train cars, $30,514.08, work equipment, $590.28, a total of $92,531.64.

For the year ending June 30, 1913 nothing was charged off for depreciation, and for the year ending June 30, 1914 nothing was charged off for a depreciation, and for the year ending June 30, 1915, $26,876.44 was charged off for depreciation.

We will further show that this depreciation account if
201 spread over the five or six years would annually amount to $68,328.31.

We will further show that the total income of the Railroad Company during the five years from 1910 to 1914 inclusive was $6,299,549.47, or an average of $1,259,904.98.

The operating expenses were $4,585,944.48, or an average of $957,118.89. The net income was $1,513,604.99, or an average of $302,720.50.

If the rates of the Commission had been applied the average would have been less by a large amount, to wit: $27,200. And in that connection, we will show that on the lowest possible estimate of the value of the property the Railroad Company was entitled to earn over three hundred thousand dollars a year, if you put the valuation at five million, as Judge Murfin did, and 6 per cent on it would be three hundred thousand dollars, and if you put it at six million it would be three hundred and sixty thousand dollars, and, of course, as I look at it, the way the property is valued and the rate to be fixed depended somewhat on each other, that is, if you screw the valuation right down on the lowest possible estimate they are entitled to a higher rate, they are entitled to the current rates that prevail in the same region, and it could not be less than 8 per cent, and up here north of Bay City, up in that country, I guess 10 per cent is the current rate that everybody has to pay.

Now, I point these facts out as part of our full proofs to show that whatever deduction on every item they are claiming to recover here would reduce the income of the Railroad Company below what it is entitled to earn under the decisions, and that it would be a reduction of the net income lower than what the Company is entitled to earn.

202 If your Honor will take this case into consideration and pass on the motion to dismiss on the legal objections we have raised to it it will not be necessary for the defendant to put in any evidence, but if you sustain plaintiff's case in any particular whatever then we ask leave to make these proofs and we will do so now if you say so. It will take about a week and we will put them in, so that we do not finally submit our case until we have a chance to put in such proofs as the Court may think it is necessary to put in, that is, if you hold they have got some kind of a case then we want to put this in evidence. You are agreeable to that, aren't you?

Mr. Clark: I would prefer to argue this before the evidence goes in.

I think I can convince Judge Coumans that this evidence would be incompetent, and if he so rules of course we would save a week's work. It is better to get his ruling on that point before the evidence is submitted, of course.

The Court: You want to argue the proposition?

Mr. Clark: Yes.

Mr. McNamara: This is on a motion to dismiss now, and I suppose what Mr. Baker said would come up more properly after the motion to dismiss.

Mr. Clark: Well, it is wise, I think, to make the motion now so I can cover it now in my argument.

The Court: Yes, they may both be submitted.

Arguments were made by counsel on the motion to dismiss, on motion to submit additional proofs as outlined by Mr. Baker,
203 on motion requiring plaintiff to elect on what counts it relied in its declaration, on the question of the plaintiff's right to recover, and if so from what date, on the question of the effect of the decision of Judge Collins in overruling defendant's demurrer and the question of the plaintiff's right to double damages, and on every other question raised by the record, files, pleadings and evidence upon which counsel desired to be heard.

At the conclusion of the arguments the trial court took the whole controversy under advisement, stating that he would decide the various questions by a written opinion.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

Motion to Elect.

(This motion will apply to all of the cases tried in connection with the cause herein entitled:

(Filed Sept. 27, 1916.)

Now comes the Defendant in the above entitled cause, at the conclusion of the evidence and argument, so far as such evidence has been submitted and argued, and now here moves the court that the plaintiffs by their attorneys elect and expressly determine
204 whether they claim a recovery in each of said cases based upon the Statutes of the State of Michigan, or whether they elect and determine to so recover based upon the so-called Common Law, or whether they elect and determine to recover on a combination of the Statutes of the State of Michigan and the Common Law.

This Defendant further moves the Court to require the Plaintiffs by their attorneys, or otherwise, to elect and determine whether

they claim the right to insist upon the complaints referred to in the declaration of the several plaintiffs and the orders thereafter made by the Railroad Commission of the State of Michigan, were made in pursuance of Section 10, sub-paragraph (*g*) and Section 22 Act 300 of the Public Acts of 1909.

This Defendant further moves the Court to require the Plaintiffs or their attorneys to elect and determine whether any proceedings had and taken in the causes above entitled were made pursuant to Section 10, Sub-section (*g*) Act 300 of the Public Acts of 1909.

Defendant now here moves the Court to require the Plaintiffs themselves or their attorneys, to indicate upon the record in this cause ...with and before the decision made by this court, their position relative to the requirements of this motion.

Dated this 26th day of September, 1916.

JAS. McNAMARA,
Attorney for Defendant.
FRED A. BAKER,
HENRY & HENRY,
WEADOCK & DUFFY,
Of Counsel.

205 *Stipulation for Election of Remedy.*

(Signed Sept. 29, 1916—Filed Sept. 30, 1916.)

(Cause entitled.)

Whereas the defendant in the cases above entitled has made a motion and filed the same in said cause to the effect that the plaintiffs or their attorneys elect under what law they seek a recovery in the said cases.

Now, therefore, it is stipulated and agréed by and between the parties to the several suits, by their attorneys respectively, that the said motion may be filed in the Court and cause above entitled, and the parties hereto by their attorneys submit to the Court their argument as to the law and facts involved in such motion.

It being understood and agreed that the defendant shall submit its brief in respect to such motion and thereafter plaintiffs' attorneys may submit their briefs in opposition thereto.

The purpose of this stipulation is to obviate the necessity of an argument on such motion, other than by the brief's hereinbefore indicated.

As hereinbefore stated, this stipulation shall apply to all cases the calendar numbers of which are listed at the head of this document.

Dated this 29th day of September, 1916.

JAS. McNAMARA,
Attorney for Defendant.
HENRY & HENRY,
WEADOCK & DUFFY,
Of Counsel.

GILLETT & CLARK,
Attorneys for Plaintiffs.

206 *Opinion of Hon. L. P. Coumans, Circuit Judge.*

(Filed Nov. 13, 1916)

This case is an outgrowth of litigation reported as: Det. & Mack. Ry. Co. vs. Mich. R. R. Com. 171 Mich. 335; Det. & Mack. Ry. Co. vs. Mich. R. R. Com. 203 Fed. 864; Det. & Mack. Ry. Co. vs. Mich. R. R. Com. 235 U. S. 402; Mich. Ry. Com. vs. Det. & Mack. Ry. Co. 182 Mich., 234; Mich. Ry. Com. vs. Det. & Mack. Ry. Co. 184 Mich. 242; Mich. Ry. Com. vs. Det. & Mack. Ry. Co. 185 Mich. 649.

The litigation resulted from certain orders of the Michigan Railroad Commission which were dated October 19, 1909, October 22, 1909, and November 3rd, 1909, and involved switching charges and freight rates to Alpena. The order relating to switching charges was served on November 6th. 1909.

Defendant's bill of complaint attacking the validity of these orders was filed in the Circuit Court for the County of Wayne in Chancery on November 20, 1909.

Voluminous proofs were taken and the case referred back to the Railroad Commission as required by law. The Commission on November 15, 1910, reaffirmed its former orders and so reported to the Court.

Judge Murfin filed his opinion on January 21, 1911, and February 11, 1911, entered a decree dismissing the bill of complaint.

This decree was affirmed by the Supreme Court of Michigan on July 22, 1913. (See 171 Mich., 335.)

The decree was entered in the Michigan Supreme Court on July 29, 1912.

An application for the allowance of a writ of error from the Supreme Court of the United States as denied both by the Supreme Court of Michigan and also by one of the justices of the
207 Supreme Court of the United States. The railroad company thereupon on August 17, 1912, filed an original bill in the District Court of the United States for the Eastern District of Michigan, Southern Division in Equity, and asked for a preliminary injunction.

This application was heard by three federal judges and the injunction was denied upon grounds which were sufficient to justify the dismissal of the bill. The opinion of the three federal judges is reported in 203 Fed. Rep. 864, and was dated March 22, 1913.

The railroad company then appealed to the Supreme Court of the United States which affirmed the decision of the District Court by an opinion filed December 14, 1914, and reported in 235 U. S. 402.

On December 28, 1914, the District Court dismissed the bill of complaint.

While the case was pending in the Supreme Court of the United States an application was made by the Michigan Railroad Commission to the Supreme Court of Michigan for a writ of mandamus

to compel the railroad company to put the commission rates into effect. The writ was granted on July 25, 1914. (See 182 Mich., 234.)

On February 4, 1915, the Supreme Court of Michigan, in an opinion reported in 184 Mich. 242, held that the railroad company was in contempt for failing to comply with the writ of mandamus. A further controversy arising out of the writ and contempt proceedings was later before the Supreme Court and was decided by an opinion reported in 185 Mich., 649.

The freight tariff which conformed to the orders of the Michigan Railroad Commission as finally filed by defendant on February 18, 1915. Until this date the defendant continued to exact
208 from Alpena shippers the rates which had been condemned by the Michigan Railroad Commission and refused to put into actual effect the orders of the commission. This action is brought to recover the difference between the rates so paid and the rates fixed by the orders of the Railroad Commission.

A demurrer to the declaration was filed and argued before my predecessor, Judge Collins, and was overruled by him. His opinion was filed with the clerk and will form part of the record in the case.

Plaintiff filed a bill of particulars containing several hundred pages and giving complete details in regard to all over-payments claimed. This bill of particulars was checked and verified by defendant's accountants before the case was tried and all errors were noted and corrected by stipulation. This stipulation was supplemented by certain explanatory testimony on behalf of plaintiff, none of which has been controverted by defendant. The court was not therefore required to decide any complicated question of fact and a jury was waived by both parties. After the completion of plaintiff's proofs defendant made a motion to dismiss in the nature of a demurrer to plaintiff's evidence. At the same time defendant made an offer of proof to be submitted if the motion to dismiss should be overruled.

This offer was carefully and elaborately framed, and appears in the record. The proof offered was objected to by plaintiff as incompetent and immaterial. My ruling on this offer and objection necessarily depended upon my decision in regard to the motion to dismiss and the decision of both questions was therefore reserved and is covered by this opinion.

In reaching my conclusions of law I have formed my own opinions independently of Judge Collins' decision on the demurrer.

209 *Conclusions of Law.*

1. The right to recover excessive or illegal freight rates by an action of assumpsit existed at common law and has not been taken away by statute.

2. The statute (Act 300 of 1909) gives additional rights and remedies, but creates no new form of action.

3. The new provisions for the protection of shippers are principally found in Sections 10 and 22 of the statute. These sections apply to different circumstances. Proceedings under one or the other of these sections may be selected to fit the circumstances. The result in each case is an order of the commission and I find nothing in the statute to indicate that an order made under Section 22 is any less effective than an order made under Section 10. I, therefore, hold that plaintiff was not required to take any proceedings under Section 10 before commencing its action.

4. If the orders of the Railroad Commission stood alone, it might be open to the defendant to question their validity in this case. It is not necessary to decide this question, as the confirmation of the orders by the state and Federal courts in the decisions cited above makes them conclusive in this case. The statute provides that the orders of the commission shall be in force until set aside by an action brought under Section 26 of the act, or rescinded by the commission. Defendant has exhausted its remedies under Section 26, and these orders must, therefore, be given effect until further action by the commission itself. I, therefore, sustain the objection to the proofs offered by defendant. Defendant may have the benefit of an exception to this ruling and by its offer and exception will be protected on appeal.

210 5. The commission rates became the law of the state twenty days after service of the commission's orders. The order reducing the switching charges to Fletcher's Dam therefore took effect on November 24, 1909, and the log rate orders took effect November 26, 1909. Defendant had the right to attack these orders in the courts, but was charged with knowledge that if its attack did not succeed, the orders would be considered as effective from the above dates. These dates should, therefore, be used as the dates from which to compute plaintiff's damages.

6. This conclusions is not changed by the fact of defendant's delay in posting and filing its new tariff or by the pendency of litigation during this period of delay.

7. Nor by any stipulation signed by the attorney general and relied upon by defendant.

For the above reasons defendant's motion to dismiss is denied.

8. In order to enjoy the fifty cent differential, plaintiff is not required to prove the reshipment by rail of the manufactured product from exactly the same logs which were shipped in by rail. The amount and nature of the merchandise reshipped are the important features. In the case of a saw mill, a thousand feet of lumber should be considered as a "manufactured product," of a thousand feet of logs. In the case of other industries the words "manufactured product" should be construed in their ordinary sense, as meaning such merchandise in nature and quantity as under ordinary circumstances will reach the market as a result of the manufacturing processes through which the logs go. Saw dust, slabs, and
211 other waste and incidental by-products may be properly ignored.

9. The question of double damages would more properly come

before me on the entry of judgment. Both parties joined in submitting this question on the hearing and I understand that both will welcome a decision of that question at this time so as to avoid any further hearing on the entry of judgment. I have decided to confine plaintiff to single damages, but plaintiff may have the same right to review my ruling on this question as if a special motion to double the damages were made and overruled after the filing of this opinion. If plaintiff considers that its rights on appeal necessitate that course plaintiff's counsel may file such a motion and enter an order overruling the same without further hearing or argument. The computations already in the record will give the appellate court all the material necessary to determine the amount which should be added to the judgment if they should decide that damages should be doubled either in whole or in part.

Findings of Fact.

1. The bills of particulars and other schedules and computations offered in evidence by plaintiff are correct, and are used in determining the amount due plaintiff. They are too voluminous to incorporate in this finding but may be considered as if incorporated herein.

2. Plaintiff during the period for which damages are allowed reshipped over the line of the defendant railroad company manufactured product which exceeded the amount manufactured from the logs shipped in by rail, and covered by the particulars of
212 plaintiff's claim. For the purposes of this finding I adopt the schedules annexed to the deposition of Henry E. Fletcher with the same force as if they were set out at length in this finding.

3. Plaintiff's single damages with interest to November 13, 1916, at five per cent, amount to $25,738.83.

Instructions for Entry of Judgment.

Section 14, of chapter 18, of the judicature act, contemplates that judgment shall be entered immediately upon the filings of findings of fact and conclusions of law. To give the attorneys on both sides an opportunity to file such further requests, exceptions or motions as they may desire in order to complete the record, the clerk is instructed to defer the entry of judgment until November 20, 1916, and to thereupon enter judgment for plaintiff for the amount above named together with interest at five per cent from November 13, 1916, to the date of the judgment entry.

Plaintiff will recover costs.

L. P. COUMANS,
Circuit Judge.

Motion for Double Damages.

(Filed November 16, 1916.)

Now comes the above named plaintiff and moves the court to enter judgment for double the amount of the damages sustained by plaintiff as found by the court in his opinion and findings heretofore filed, or in default thereof to double a part of the said damages. This motion is made in the alternative as follows, viz:

213 1. To double plaintiff's entire damages aggregating $25,738.83.

2. As an alternative to the above to double so much of plaintiff's damages as have accrued since July 22, 1912, viz: $14,921.95.

3. As an alternative to the above to double so much of plaintiff's damages as have accrued since March 22, 1913, viz: $10,199.53.

4. As an alternative to the above to double so much of plaintiff's damages as consists of the interest accrued on the sums paid by plaintiff in excess of the lawful charges, viz: the sum of $4,392.40.

5. As an alternative to the above to double so much of plaintiff's damages as have accrued since July 25, 1914, viz: $288.60.

This motion is based upon the records and files in this cause and upon the opinion, conclusions of law, and findings of fact heretofore filed herein.

GILLETT & CLARK,
Attorneys for Plaintiff.

Exceptions by Defendant to Opinion and Findings of Judge Coumans, Filed Nov. 13, 1916.

(Filed November 16, 1916.)

Now comes the said defendant, by James McNamara and Henry & Henry, its attorneys, within four days after the filing by the circuit judge of his findings of fact and law in this cause, and

214 alleges exceptions to the matters of law embodied in such findings as follows:

1. The defendant excepts to the ruling of the court that common law actions of assumpsit for the recovery of excessive or illegal freight rates have not been taken away by statute.

2. The defendant excepts to the ruling of the court that the statute, Act 300 of the Public Acts of 1909, gives additional rights and remedies, but creates no new form of action.

3. The defendant excepts to the ruling of the court sustaining the objection to the proofs offered by the defendant.

4. The defendant excepts to the ruling of the court that the commission rates became the law of the state twenty days after the service of the commission's orders, viz: Nov. 24, 1909, and Nov. 26, 1909.

5. The defendant excepts to the ruling of the court that the de-

fendant's delay in posting and filing its new tariff or by the pending of the litigation, or the stipulation of the attorney general, did not change the conclusion that the orders of the commission were the law of the state twenty days from the service of said orders.

6. The defendant excepts to the ruling of the court denying the defendant's motion to dismiss the plaintiff's action.

7. The defendant excepts to the ruling of the court that the plaintiff can recover the differential (rebate) of fifty cents
215 per thousand feet as an excessive charge and without proving the reshipment by rail of the manufactured product from exactly the same logs which were shipped in by rail.

8. The defendant excepts to the ruling of the court that the orders of the commission are conclusive proof that the rates collected by the defendant were excessive, and of the amount of the excess.

9. The defendant excepts to the ruling of the court that the facts found by it supports its conclusions of law.

10. The defendant excepts to the ruling of the court that plaintiff is entitled to judgment.

JAMES McNAMARA,
HENRY & HENRY,
Attorneys for Defendant.

Requests for Findings of Fact and Conclusions of Law.

After the opinion had been filed by Judge Coumans and before judgment, the attorneys for the respective parties made and submitted to the court the following requests for findings of fact and conclusions of law.

Defendant's Requests for Findings of Fact and Conclusions of Law.

(Filed November 27, 1916.)

To Hon. L. P. Coumans, Circuit Judge, and the Circuit Court for the County of Bay:

Now comes the defendant by its attorneys and counsel and respectfully requests said judge and the court to pass specially
216 on all of the points, requests and questions of law and fact hereinafter particularly set forth in the five several causes and actions pending before this court as hereinafter entitled.

The requests and points of law and fact herein referred to are presented to this court pursuant to circuit court Rule 45 and the statute in such case made and provided.

Dated, this 21st day of November, 1916.

JAMES McNAMARA,
Attorney for Defendant.

FRED A. BAKER,
HENRY & HENRY,
WEADOCK & DUFFY,
Of Counsel for Defendant.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

Cal. No. 10211.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10216.

RICHARDSON LUMBER CO., Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10220.

CHURCHILL LUMBER CO., Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10221.

MICHIGAN VENEER CO., Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10222.

ISLAND MILL LUMBER CO., Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

By stipulation made and entered into by and between the parties through their attorneys respectively, the foregoing five cases were tried and heard together by Honorable L. P. Coumans, circ-
218 cuit judge of Bay county, and the foregoing requests apply to each of said cases so far as the same shall be consistent and applicable thereto.

Pursuant to sections 14 and 15 of chapter 18 of the Judicature Act, and pursuant to circuit court Rule 45, and pursuant to all other laws *nad* statutes pertaining to the subject matter of such requests, the defendant, by its attorneys, having received *form* said circuit judge his opinion, find-ngs of fact, and conclusions of law,

now here comes into this court and respectfully requests the court and the judge thereof *ot* modify, change and add to such opinion, finding of facts and conclusions of law as follows:

First.

That the petitions and complaints heretofore made by the plaintiffs to the Michigan Railroad Commission did not comply with the provisions of Act No. 300 of the Public Acts of 1909, and did not authorize and empower such Railroad Commission to issue and make the orders declared upon by the plaintiffs respectively in the several causes hereinbefore entitled.

Second.

That the orders of the Michigan Railroad Commission of date October 19th, October 22nd and November 3rd, 1909, are unauthorized, illegal and void, because no lawful petitions have heretofore been made by the plaintiffs or either of them, thereby making such orders forceful or effective.

Third.

That whatever force or effect such orders may have pro-
219 vided as a condition precedent to the making of such orders effective, the law required that the same should be filed with the Michigan Railroad Commission, and posted and published in the various stations of the defendant; these provisions and requirements were not complied with, therefore the plaintiffs cannot have judgments in these suits.

Fourth.

That by virtue of the order made by Judge Mandell, in the circuit court for the county of Wayne, (referred to in the evidence submitted in this cause), and by virtue of the stipulation made by and on the part of the plaintiffs, by Attorney General John E. Bird, and by and on behalf of the defendant by James McNamara, defendant's attorney, such orders so declared upon did not become forceful and effective until on or about the 18th day of February, 1915, at the conclusions of the litigation before then continuously pending before the Railroad Commission of Michigan, the circuit court for the county of Wayne, the supreme court of the state of Michigan, the district court of the United States for the eastern district of Michigan, southern division, the United States Appellate court, and the supreme court of the United States.

Fifth.

That at the conclusion of the proofs submitted to this court by and on behalf of the plaintiffs, the motion made on behalf of the defendant to dismiss said several causes and enter therein judgment in favor of the defendant of no cause of action will be made and granted by this court.

Sixth.

That the plaintiffs could not institute in this court the pro-
220 ceedings heretofore had and taken therein without complying with sub-section (*f*) of section 10 of said Act 300.

Seventh.

That as a condition precedent to the commencement of the several causes above entitled, the plaintiffs were required to make complaint to the Railroad Commission for any and all excessive or illegal, irregular or exorbitant, unreasonable or unjustly discriminatory freight rates before then exacted from the plaintiffs by the defendant for the recovery of which these several suits were instituted. This plaintiffs did not do and judgment of no cause of action will be made and entered.

Eighth.

That in the event this court should determine that the plaintiffs were entitled to recover the claims made by them or any part of such claims, in that event the motion made by and on the part of the defendant to submit proofs relative to the issues framed and made by and between the parties hereto will be granted.

Ninth.

That the plaintiffs cannot recover in their several suits because before the commencement thereof the Railroad Commission did not determine the amount, if any, of the asserted excessive or illegal, irregular or exorbitant freight rates exacted by defendant, and because said defendant was never permitted to refund or pay to the plaintiffs any amount of excessive or illegal freight rates asserted to have been exacted from the plaintiffs by the defendant.

221 Tenth.

Plaintiffs cannot recover in their respective suits because they did not comply with any of the mandatory or other provisions of said section 10, hereinbefore referred to.

Eleventh.

The court is respectfully requested to find as a conclusion of law that the plaintiffs cannot recover in their suits because the tariff of rates and the switching charges into the city of Alpena declared upon were never scheduled, and were never filed with the commission, nor were they ever posted and published pursuant to the statute in such case made and provided.

Twelfth.

This court is respectfully requested to require the plaintiffs to elect and determine whether they demand recovery by virtue of

Act 300 of the Public Acts of 1909, or whether they claim the right to recover independent of such act, and by virtue of the common law.

Thirteenth.

This court is respectfully requested to require the plaintiffs to elect and determine whether they claim the right to recover by virtue of the invocation of both the common law of the state of Michigan, and the statute law, hereinbefore referred to.

Fourteenth.

The court is respectfully requested to construe paragraph 3, of its conclusions of law, thereby indicating what circumstances would authorize proceedings pursuant to Section 10, of said Act
222 300, and what circumstances would authorize a recovery by virtue of the provisions of Section 22. In view of the conclusions of law indicated by this court in said third paragraph thereof this court is respectfully requested to find and determine that no suit could be instituted by the plaintiffs regardless of the circumstances evidenced in the instant case, without invoking the provisions of said Section 10.

Fifteenth.

This court is respectfully requested to permit the defendant in each of the said several causes to submit proofs respecting the subject matter alleged in the plaintiff's declaration covering the entire time for which recovery is demanded, providing this court shall determine that the plaintiffs are entitled to recover in whole or in part for the asserted excessive or illegal, irregular or exorbitant, unreasonable or unjustly discriminatory freight rates exacted by the defendant.

Sixteenth.

The court is respectfully requested to permit the defendant to give evidence relative to the issues framed in such suits, in any event, from and after the 15th day of August, 1910, that being the date when the last evidence was taken respecting said three several orders hereinbefore referred to.

Seventeenth.

The court is respectfully requested to find that the order made by the Michigan Railroad Commission relative to a switching charge to and from the city of Alpena and the Fletcher Dam, should be a commodity tariff rate, and not a switching rate
223 by reason of the location of said Fletcher's Dam, with respect to the location of the station limits of said defendant at the City of Alpena.

Eighteenth.

The court is respectfully requested to deny any right of recovery on behalf of the plaintiffs, because Honorable James O. Murfin, Circuit Judge, in and for the County of Wayne, peremptorily declined to hear the defendant on its motion for a rehearing as to the legality of the three several orders hereinbefore referred to, and all other proceedings had and taken by and before said Court and the judge thereof.

Nineteenth.

This court is respectfully requested to find and determine that in event the plaintiffs invoke the common law remedy, the same would operate as a repeal of the Statute to the extent that the same was so invoked.

Twentieth.

The court is respectfully requested to expressly determine and find that the proceedings had and taken by way of demurrer in these suits did not to any extent or in any particular adjudicate any of the issues involved in these suits.

Twenty-First.

The court is respectfully requested to find and determine that in order to entitle plaintiffs to recover in these proceedings any rebate of 50 cents per thousand feet of the manufactured product shipped out, that such a rebate can only be accorded to the plaintiffs
224 by the outshipment of products manufactured from the same forest products shipped to the plaintiffs.

Twenty-Second.

The court is respectfully requested to find that any parts of such forest products shipped into them which were not actually shipped out, such as the hearts of logs from which veneer was taken, and other parts of such forest products not shipped out, should be credited to the defendant with respect to any provision in the tariff of rates made by said Railroad Commission, providing for a rebate on out-shipments; and because nothing in plaintiff's bills of particulars specified such reservations, plaintiff cannot generalize it'-claim and claim rebate therefor.

The court is respectfully requested to find and determine that no judgment can be entered in favor of the plaintiffs by reason of the fact that the proceedings had and taken on the issues made herein before this court is overcome by the great weight and preponderance of evidence in favor of the defendant.

Twenty-Fourth.

Th-s court is respectfully requested to find and determine that in no event can the plaintiffs recover for any asserted excessive or

illegal, irregular or exorbitant rates from a date prior to six months before the commencement of such action pursuant to Sub-section (*g*) of said Section 10.

Twenty-Fifth.

This court is respectfully requested to find that the three said several orders declared upon by the plaintiffs expressly pro-
225 vide for the posting and publishing of any rates made by said Railroad Commission, and further that said orders declared upon were not posted and published until on or about the 18th day of February, 1915, and that the provisions of the statute respecting such posting and publishing are mandatory and by reason thereof are requirements and conditions precedent to any right of recovery on behalf of the plaintiff.

Twenty-Sixth.

The court is respectfully requested to find that no amount can be recovered on behalf of the plaintiffs by reason of Sections 16 and 18 of said Act 300, and that said defendant by exacting amounts from the plaintiffs other or different than the posted and published tariff of rates would be an express violation of the provisions of such statutes.

Twenty-Seventh.

The court is respectfully requested to determine and find that the defendant by exacting any other or different amounts than provided in the schedule of tariff rates posted and published as aforesaid, would work an unlawful injustice to the public generally, and thereby destroy the uniformity of rates provided for in such statute.

Twenty-Eighth.

The court is respectfully requested to find and determine that Section 10 of said Act is designed to provide reparation to the shipper and relates exclusively to illegal and excessive, irregular or ex-
orbitant rates exacted prior to the commencement of any
226 suit for the recovery of any such asserted excessive or illegal rates, and because plaintiffs have not complied therewith no recovery can be had in this suit.

Twenty-Ninth.

The court is respectfully requested to find that said Section 22 provides no remedy for the recovery of excessive and illegal, irregular or exorbitant rates exacted by the defendant common carrier, or any other common carrier; that Section 10 does provide such remedy, and by reason of said plaintiffs ignoring Section 10 in these proceedings no recovery can be had.

Thirtieth.

The court is respectfully requested to find that Section 22 of the said Act relates to the determination of tariff rates in the future and not for irregular or exorbitant rates exacted in the past.

Thirty-First.

The court is respectfully requested to find that on the 20th day of November, 1909, Hon. Henry A. Mandell made an order in the so-called rate case, requiring the Michigan Railroad Commission to show cause at a time and place therein named, why a temporary injunction should not issue against said Commission as prayed for in the Bill of Complaint made by the defendant, a copy of which order appears on page 123 of the printed record in said rate case, which copy may be used as if set forth in this finding.

Thirty-Second.

That on November 24, 1909, Honorable George S. Hos-
227 mer, Circuit Judge of Wayne County, made an order therein restraining the said Commission from putting into operation or making effective, three orders of such Commission, hereinbefore referred to, a copy of which appears on page 152 of the printed record in the rate case, which copy may be used as if set forth in this finding.

Thirty-Third.

That on the 2nd day of December, 1909, a stipulation was entered into in said rate case by and between the attorneys for the respective parties, therein providing that the application for an injunction and the order to show cause made by said court, and the hearing thereon, was to be continued in its then present state until the final determination of such cause upon the merits thereof, of which a copy appears on page 153 of the printed record in the rate case, which copy may be considered as evidence of the original thereof, and may be used as if set forth in this finding.

Thirty-Fourth.

That on the 24th day of January, 1911, the attorneys for said Detroit & Mackinac Railway Company and intervening complainants in the chancery proceedings instituted in the Circuit Court for the County of Wayne, to review the orders of said Michigan Railroad Commission, made and filed in said court and cause a motion for rehearing, which said motion came on to be heard before Judge Murfin on the 11th day of February, 1911, whereupon said Circuit Judge, who made the opinion and decree affirming the decision of
the Railroad Commission, peremptorily refused to grant a
228 hearing on said motion, stating that in view of the fact that the Supreme Court of the United States would ultimately

have to review the case, he would simply deny the motion as a matter of form, etc., of which a copy of said motion and all proceedings had and taken thereunder appears on pages 785-790 of the printed record in the rate case, which copy may be used as if set forth in this finding.

Thirty-Fifth.

That supplemental order declared upon by plaintiffs made by the Michigan Railroad Commission, November 3, 1909, designated as D-188, was made by such Commission without giving the defendant in these causes opportunity to be heard thereon, and without submission of proofs on behalf of either party thereto, providing in such order as follows:

"This order may be rescinded, altered or amended at any time when in the judgment of the Commission, such action should be taken."

A copy of which supplemental order is set forth in the printed record of the rate case at pages 121-123, which copy and the proceedings had and taken prior to the time the same was made, may be treated as if set forth in this finding.

Thirty-Sixth.

That by virtue of all proceedings had and taken subsequent to the making of the three orders declared upon, and by virtue of the contents of such three orders, and by virtue of the decision of the Supreme Court of the State of Michigan, made July 22, 1912, reported in 171 Mich. 335-365, wherein said Supreme Court concluded its decisions as follows:

229 "That decree of the court below is affirmed, but without prejudice to the right of the Railway Company to move the Commission for a modification of its rules as its experience and the facts coming to its knowledge may appear to warrant."

This court is unauthorized to render judgments in favor of plaintiffs as indicated in the court's findings filed November 13, 1916, without evidence other than the said three orders to support such judgment, especially on and after the 15th day of August, 1910, that being the date when the last proofs were submitted on the merits as to this action, and as giving to said orders thereafter, any force and effect as prima facie evidence or otherwise as to the reasonableness of such orders.

Thirty-Seventh.

This court is respectfully requested to find that this defendant made and filed answers to the several petitions or complaints declared upon, which said answers are contained in the printed record of the rate case, said answers being found on pages 4-8, 11-16, 21 of such printed record, the same to be treated as if set forth in this finding.

Thirty-Eighth.

The court is respectfully requested to find that the stipulations attached to the several bills of particulars in the instant cases, were of no force and effect other than a determination of a correct computation of the shipments to or by the several plaintiffs as indicated in such bills of particulars; such stipulations being made solely to avoid a reference for computation and to avoid taking the time of the court in proving the correctness of the figures contained in such bills of particulars.

230 Thirty-Ninth.

Wherever in these requests we have made reference to the printed record in the rate case, it is understood that the same applies to the printed record used on the trial of these cases involving proceedings had and taken by the Michigan Railroad Commission in connection with its three several orders declared upon by the plaintiffs, and all proceedings thereafter had and taken pursuant thereto.

Fortieth.

The court is respectfully requested to find that the provisions of Act 300 of the Public Acts of 1909 whereby any lawful orders made by said Commission shall not take effect and become operative until twenty days after the service of a certified copy on such common carrier, includes the provisions of such orders as set forth therein, and that the enforcement of such orders must be pursuant to the requirements therein contained in the order designated. That is to say, the posting and publishing of such orders shall have precedence in such enforcement; and the twenty day period is a provision designed to advise the shipper and the Commission of the necessity of the enforcement of such order, unless complied with by the common carrier.

Forty-First.

The court is respectfully requested to find that the rebate provisions in the tariffs of the defendant railway company and in the orders of the Railroad Commission are in violation of the provisions of said Act 300, prohibiting rebates as indicated in sections 16, 17 and 18 of the Act hereinbefore referred to.

231 Forty-Second.

The court is respectfully requested to find that all common law remedies for irregular or exorbitant charges by railroad companies in the State of Michigan, for the carriage of freight, have been superceded and abolished by Sub-section (*g*) of Section 10, of the Act for the regulation of common carriers, being Act 300 of the Public Acts of 1909.

Forty-Third.

Sec. 22 of Act 300 aforesaid authorizes the Railroad Commission (subject to the provision of the act referred to) to "fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulations, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed, or service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory." The orders relied upon by the plaintiffs allege that the rates charged are unjust, unreasonable and excessive. (Order D-188.)

There is nothing in the order or orders of the Railroad Commission indicating their judgment as to the rates named by the railroad Commission, notwithstanding the fact that they assert that such rates "should be reduced as hereinafter set forth."

The statutes relied upon by the plaintiffs require a determination on behalf of the Railroad Commission as to the justice and reasonableness of the rates named by them, and having failed to make such determination, such orders are void.

232 Forty-Fourth.

After the Railroad Commission had made the orders declared upon by the plaintiff, the subject matter of such orders was continuously involved in legal proceedings, authorized by law; had the defendant applied to the commission for a different and higher rate until the questions involved in litigation were determined, two proceedings for the determination of the same question would have been pending, viz: the duly authorized legal proceedings to determine the legality and effectiveness of the orders or certain parts thereof, and proceedings before the commissioners for the purpose of obtaining the same results. The defendant could not appeal from an order of the Railroad Commission respecting the rates, and at the same time institute proceedings for the sole purpose of obtaining a like determination.

Had the defendant complained to the Michigan Railroad Commission because of the rates in the orders referred to, being inadequate, the Commission to be consistent would have denied the relief prayed for. The right to appeal in that proceeding would have obtained, and the anomalous situation would be two appeals, by the same parties, respecting the same question, by reason thereof, the plaintiffs in the instant case are not entitled to judgment as indicated in the court's findings.

Dated this 22nd day of November, 1916.

JAMES McNAMARA,
Attorney for Defendant.
FRED A. BAKER,
HENRY & HENRY,
WEADOCK & DUFFY,
Of Counsel for Defendant.

233 *Plaintiff's Requests for Findings of Facts.*

(Filed Nov. 27, 1916.)

The plaintiff requests the court to file certain additional findings of fact as contained in copies of said proposed findings annexed hereto and served herewith.

GILLETT & CLARK,
Attorneys for Plaintiff.

To James McNamara, Henry & Henry, Fred A. Baker, Weadock & Duffy, Attorneys and Of Counsel for Defendant.

SIRS: Take notice that the above is a true copy of request for additional findings of fact this day filed in the above entitled cause and that annexed thereto is a true copy of the said proposed findings all of which will be presented to the Hon. L. P. Coumans, Circuit Judge, for his approval and signature on Monday, November 20, 1916, at the opening of court on that day or as soon thereafter as counsel can be heard.

Yours, etc.

GILLETT & CLARK,
Attorneys for Plaintiff.

234 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

Additional Findings of Fact.

1. On January 20, 1909 defendant filed its freight tariff known as M. R. C. No. 205, made effective February 1, 1909. A copy is found in 171 Mich. on pages 353-354 which is to be treated as if set forth herein.

2. On February 8, 1909, defendant filed its freight tariff known as M. R. C. No. 208, made effective February 20, 1909. A copy is found in 171 Mich. on page 354, and may be treated as if set forth herein.

3. On February 23, 1909, the Fletcher Paper Company filed a complaint before the Michigan Railroad Commission which is set forth on pages 1-4 on the printed record filed in the Michigan Supreme Court in the case reported in 171 Mich. on page 335 (hereafter for convenience referred to as the "rate case"). This copy is referred to with the same effect as if set forth in this finding.

4. On March 3, 1909, defendant filed a tariff, effective March 14,

1909 increasing the switching charge between Alpena and Fletcher's Dam from $2.00 to $5.00 per car.

5. On March 11, 1909, Fletcher Paper Company filed
235 a complaint before the Michigan Railroad Commission, a copy of which is found on pages 9-11 of the printed record in the rate case, which copy may be treated as if set forth in this finding.

6. On April 19, 1909, Frank W. Gilchrist and others filed a complaint before the Michigan Railroad Commission a copy of which is found on pages 18-20 of the printed record in the rate case, and is to be treated as if set forth in this finding.

7. On April 24, 1909, the Fletcher Paper Company filed a complaint before the Michigan Railroad Commission a copy of which appears on pages 22-24 of the printed — in the rate case, which copy may be treated as if set forth *ni* this finding.

8. Issue was joined and evidence submitted to the Michigan Railroad Commission and hearings were had upon the merits of the petitions above mentioned.

9. On October 19, 1909, the Michigan Railroad Commission made an order a copy of which is found on pages 120-121 of the printed record in the rate case and may be treated as if set forth in this finding.

10. A certified copy of the order last mentioned was served on defendant on November 4, 1909.

11. On October 22, 1909, the Michigan Railroad Commission made an order a copy of which is found on pages 118-118 of the printed record in the rate case, which copy may be treated as if set forth in this finding.

12. A certified copy of the order last mentioned was
236 served on defendant on November 1, 1909.

13. On November 3, 1909, the Michigan Railroad Commission made an order a copy of which is found on pages 121-123 of the printed record in the rate case, which copy may be treated as if set forth in this finding.

14. A certified copy of the order last mentioned was served on the defendant on November 6, 1909.

15. On November 20, 1909, defendant filed a bill of complaint in the Circuit Court for the County of Wayne in chancery, a copy of which with the exhibits thereto annexed appear on pages 123-151 of the printed record in the rate case, which copy may be treated as if set forth in this finding.

16. On February 3, 1910, by an order of the circuit court for the County of Wayne in chancery, Frank W. Gilchrist, Churchill Lumber Company, Island Mill Lumber Company and the Fletcher Paper Company were permitted to intervene as defendants to the bill of complaint last mentioned.

17. Issue was joined in the case last mentioned and much testimony taken therein, and such testimony was certified back from the Circuit Judge to the Michigan Railroad Commission.

18. On November 15, 1910, the Michigan Railroad Commission submitted to and filed in the Circuit Court for the County of Wayne in chancery a report, of which a copy appears on pages 769-770 of

the printed record in the rate case, which copy may be used as if set forth in this finding.

237 19. On January 21, 1911, the Hon. James O. Murfin, one of the Circuit Judges of the County of Wayne filed his opinion, a copy of which appears on pages 771-785 of the printed record in the rate case and may be treated as if set forth in this finding.

20. On February 11, 1911, a decree was entered in the Circuit Court for the County of Wayne in chancery, a copy of which appears on pages 791-792 of the printed record in the rate case, which copy may be treated as if set forth in this finding.

21. Proceedings were duly taken for an appeal by defendant to the Supreme Court of the State of Michigan, a hearing was there had, and a decision rendered on July 22, 1912, affirming the decree of the circuit court for the County of Wayne in chancery, which decision is reported in 171 Mich. 335.

22. A decree of the Supreme Court of Michigan in accordance with the opinion last mentioned was entered on July 29, 1912.

23. On August 17, 1912, defendant filed a bill of complaint in the District Court of the United States for the Eastern District of Michigan, Southern Division, in Equity, a copy of which with the exhibits thereto annexed appears on pages 1-20 of the printed record filed in the Supreme Court of the United States in the case reported in 235 U. S. 402 which copy may be used as if set forth in this finding.

24. A hearing was held in the case last mentioned and an opinion rendered therein on March 22, 1913, a copy of which is reported in 203 Fed. 864 and may be treated as if set forth in this

238 finding. On the same date the District Court aforesaid entered an order denying the motion for an injunction in the case last mentioned.

25. On July 25, 1914, the Supreme Court of Michigan filed an opinion granting a writ of mandamus as appears from the said opinion reported in 182 Mich. 234.

26. On December 14, 1914, the Supreme Court of the United States filed its opinion and entered its decree affirming the order of the District Court of the United States for the Eastern District of Michigan as appears from the said opinion as reported in 235 U. S. 402.

27. On December 28, 1914, the District Court of the United States for the Eastern District of Michigan entered a decree dismissing the bill of complaint therein filed as aforesaid.

28. On February 4, 1915, the Supreme Court of Michigan filed its opinion reported in 184 Mich. 242.

29. On February 8, 1915, defendant issued a certain tariff known as G. F. D. No. 775-A, a copy of which is contained in plaintiff's declaration herein, and may be treated as if set forth in this finding.

30. Plaintiff is a Michigan corporation engaged in the manufacture of paper from forest products.

31. The facts and figures set forth in plaintiff's bill of particulars

are true and correct and may be treated as if set forth in this finding.

32. The facts and figures set forth in the schedule an-
239 nexed to the deposition of Henry E. Fletcher are true and correct, and may be treated as if set forth in this finding.

33. In the manufacture of paper by plaintiff, the forest products received over the line of defendant's railroad are necessarily mingled and confused with forest products received from other sources, so that it is impossible to identify any portion of the finished product as manufactured from any specific log or group of logs received.

34. The facts and figures set forth in the schedules annexed to the deposition of Warren Penniman as Exhibits 34 and 35 are true and correct, and may be treated as if set forth in this finding.

35. When plaintiff paid to defendant the various sums for which recovery is sought herein, defendant's representatives receiving such payments stamped upon the receipts (called expense bills) an endorsement substantially as follows: "paid under protest," or "Paid under protest on account of excessive charges, Fletcher Paper Company, by W. F. Victor, Treas."

36. The difference between the amount shown by plaintiff's bill of particulars and the amount for which plaintiff is permitted to recover, represents over-charge paid prior to November 24, and November 26, 1909.

L. P. COUMANS,
Circuit Judge.

On November 27, 1916, after the filing of the Court's opinion
Nov. 13th, 1916, and the filing of requests for additional findings of both parties pursuant to notice and agreement of counsel,
240 a hearing was had before the Court on the foregoing requests; at the conclusion of arguments on behalf of all parties to the suit the following proceedings were had.

The Court: When the findings in this case were made and filed by the court the question of additional time before the entry of judgment was taken up with the court by Mr. McNamara's petition, and it was understood at that time that by granting the time from the 20th to the 27th, which is today, that the matter should be closed up.

Now it may be some advantage to the defendant in this case to have it appear of record, but it would be utterly impossible for the court, with the limited time he can sit here as a court to take this case and go through it and give satisfactory reasons, and the various requests that have been made by the defendant, and if he overrules them, and whatever is done has got to be done today, or not later than tomorrow, as the changed conditions here will make that necessary. The court will retire probably the day after tomorrow, I am not advised as to the exact time, but Mr. Houghton told me a week ago and the record can show that he succeeds me here as judge, that he would not qualify until the first of the month. I have been informed since that time that he is to qualify on the 29th of this month, so that I don't see how I could, even if inclined

to do so, go into the matter any more elaborately, if I deny these requests and show reasons for them, than as stated in the findings Mr. Clark has filed here, to be adopted if I adopt them,—I want to get this matter off my hands, and I think it is to the interest of everybody to close it up now and not be submitted to Judge Houghton or somebody afterwards, because it will cause undoubt-
241 edly a lot of time and delay, and it seems to me that the court of last resort in this State will be able to protect the rights of defendant fully, because you have your requests there covering as I read in every phase of the case known to me, and if they are denied you are square on your rights. To get this matter in the condition I think it should be in I shall sign the findings as prepared by the plaintiff with the addition of the forty-third and forty-fourth requests which were refused.

There has been some amendment suggested to the findings of defendant in an amendment filed later as to the proper wording of these requests, and I understand there will be no objection to their being allowed, and they may stand as they appear to be amended by the findings filed. If there is any other question.

Mr. McNamara: As I understand your honor will enter an order denying all of our requests? What we object to is adopting the language of Mr. Clark in explanation of certain requests.

The Court: Well, the court will say that while that is the language of Mr. Clark, I have gone over those and have had that paper before me for several days, and I will adopt that as my own language in the case, and the additional findings that Mr. Clark asks for will be filed and allowed.

Mr. Clark: I have not presented here today the motion for double damages, but it has been filed, and I assume that your Honor has your mind settled on that subject, and the order will be made overruling the motion.

The Court: The order will be made overruling the motion for double damages.

242 Mr. Clark: I have here a computation of the amount of each judgment under the statute. The statute provides for the charging of interest on the findings, that means two weeks' interest on each of these amounts. Will you gentlemen take my computation of two weeks' interest on each of the findings?

Mr. McNamara: There seems to be some misunderstanding between us with reference to what the court has now held. Mr. Clark prepared certain additional facts which are I think in addition some 35 or 36 of them here.

The Court: In addition to what the court finds in the findings?

Mr. McNamara: Yes.

The Court: Well, what I stated, I think it was that those would be allowed and incorporated as my findings in the case.

Mr. McNamara: Then the other paper that Mr. Clark prepared with reference to the findings, I understand the court adopts that too?

The Court: Yes, adopts that, and to make your record right you want to add that the forty-third and forty-fourth requests is refused.

Mr. Henry: In regard to your request that we concede, your computation we have spent very little time on the question of figures; we assume that so far as the computation is concerned where made it is correct, but we intend to go over the figures and any errors at any time of course can be corrected.

243 Mr. Clark: Yes. Of course somebody has got to determine the amount on which judgment shall be entered. 14 days' interest on $1.00 is .00194. I have taken each finding and multiplied it by that figure, is all I have done.

Mf. Henry: Rather than concede the correctness either make proof or submit it to the court, because we haven't given any attention to the computation at all.

Mr. Clark: I suppose the order overruling the motion for double damages is merely an order entered in the journal until signed.

The Court: Well, I don't think so. The journal will be signed as of today.

Mr. Clark: A journal entry overruling the plaintiff's motion for double damages in each case.

The Court: Have you agreed upon the figures?

Mr. Clark: Counsel don't wish to agree, because they don't wish to waive anything, but I will state I have made a computation which has been checked up and is correct, which amounts to a little less than two tenths of one per cent on each amount for the 14 days. I have the figures here that I shall be sworn regarding it if counsel wishes.

Mr. Henry: I note counsel is having an order entered by the clerk upon an order of the court. Now there are numerous motions made, one to dismiss, one to elect, and other like things. I didn't understand it would be necessary to have orders entered by the court more than overruling the double damages.

244 Mr. Clark: Well, you have something on the record and I have not. You have the court's findings in which he denies your requests but nothing to show about my motion for double damages. I have made a formal motion to double the verdict, which I have to do. The court stated in his original opinion that this is premature and the matter was not before the court until this morning.

The Court: It couldn't be until the other question was settled.

Mr. Henry: We in like manner made specific motions here in reference to election. Should they be entered?

The Court: I don't think so. I think you are fully protected on that.

Mr. Clark: Let the record show that I consent at any time to the entry of any order overruling any of your motions that you wish to enter in the record to make the record complete, if that helps you any.

Mr. Henry: We don't think it is necessary.

Mr. Clark: Neither do I.

The Court: However, if you discover it is you have your record on it.

EDWARD S. CLARK, having been duly sworn testified as follows:

I have computed 14 days interest on the amounts found
245 by the court in each of these cases, making the amount with interest to this date for which judgment should be entered as follows: Fletcher Paper Co., $25,788.76; Richardson Lumber Co., $28,239.65; Island Mill Lumber Co., $24,534.33; Churchill Lumber Co., $14,336.13; Michigan Veneer Co., $6,058.19.

I now move for an entry of judgment in each of these cases for these amounts.

The Court: Do you want any objection to that on record?

Mr. Henry: Yes, I think we will have it understood for the reasons filed in the case we object to the entry of judgment as asked for in each of the five cases.

The Court: The motion will be granted, and judgment entered.

Mr. Henry: The court will grant us an exception, if it is necessary.

The Court: Yes.

Mr. McNamara: We would like to have the usual stay of proceedings in this case if your honor please.

The Court: No objection to that.

Mr. Clark: I want to have the record show that in moving for entry of judgment in these amounts I do not waive my claim that they should be doubled before judgment is entered.

The Court: Those judgments will be entered so the journal can be signed today.

246 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACINAC RAILWAY CO., Defendant.

Rulings on Defendant's Requests to Modify and Add to the Opinion, Findings of Fact, and Conclusions of Law Made Herein.

(Filed Nov. 27, 1916.)

The first request made by defendant is refused.

The second request is refused.

The third request is refused.

The fourth request is refused.

The fifth request is refused.

The sixth request is refused.

The seventh request is refused.

The respect to the eighth request, defendant was given an opportunity to submit proofs at the close of the proofs offered by plaintiffs. Defendant then made an offer to submit proof of certain facts which I have determined to be inadmissible and I have, therefore, sus-

tained the objections to such offer. The evidence relied upon by plaintiffs is apparently undisputed, and counsel for all parties stated in open court that a jury was waived because the questions to be decided were entirely questions of law. I have no desire to exclude any competent evidence in behalf of the defendant, but in
247 view of my understanding of the situation, as above explained, I think that the eighth request should be refused and therefore refuse the same. Defendant's right will be protected by the inclusion in the record of defendant's offer of proof made at the close of plaintiff's evidence.

The ninth request is refused.

The tenth request is refused.

The eleventh request is refused.

In respect to the twelfth request, the special counts of plaintiff's declarations show to what extent plaintiffs rely upon the statute and to what extent upon the common law. The nature of the proofs submitted by plaintiffs shows that the claims made by plaintiffs upon this hearing are based upon these special counts and there has been no indication of any other or inconsistent claims, based upon the common counts or otherwise. Plaintiffs are not taking any inconsistent positions and I see no ground for requiring any election. The twelfth request is therefore refused.

The thirteenth request is refused for the same reason.

The circumstances which will authorize proceedings pursuant to section 10 of Act 300 of 1909 are the circumstances mentioned in that section. The same is true with respect to section 22 of the act. Except as herein stated the fourteenth request is refused.

The fifteenth request is refused for the reasons stated with respect to the eighth request.

The sixteenth request is refused for the reasons stated with respect to the eighth request.

The seventeenth request is refused.

The eighteenth request is refused.

The nineteenth request is refused.

I find as requested by the twentieth request so far as concerns the effect of the demurrer and the proceedings thereon, upon my
248 decision of the case, and state that my decision has been formed independently and has not been controlled by the opinion on the demurrer. The language of the twentieth request is possibly too broad to be precisely accurate and I, therefore, make my finding in this form rather than in an unqualified granting of the request.

The twenty-first request is refused.

The twenty-second request is refused, and in respect to the subject of such request I find that the hearts of veneer logs are to be treated like slabs and sawdust, as incidental by-products which can be ignored in considering the reshipment of manufactured product.

The twenty-third request is refused.

The twenty-fourth request is refused.

The twenty-fifth request is refused.

The twenty-sixth request is refused.

The twenty-seventh request is refused.

The twenty-eighth request is refused.

The twenty-ninth request is refused.

In regard to the thirtieth request, it is impossible to generalize accurately in a few lines in respect to the application of section 22 of the statute. The section is plainly expressed and no generalization in regard to its application is necessary for the determination of this case.

The thirtieth request is therefore refused.

The thirty-first request is granted except that I consider it unnecessary and inadvisable to attempt to state the substance of any document of importance, otherwise than by literal quotation. I, therefore, find as follows in answer to the thirty-first request.

On the twentieth day of November, 1909, Hon. Henry A. Mandell made an order in the so-called rate case, a copy of which order
249 appears on page 123 of the printed record in said rate case, which copy may be used as if set forth in this finding.

In answer to the thirty-second request and in pursuance of a stipulation admitting the printed record in evidence as proving itself and its contents with the same effect as if duly authenticated and certified, I find that on November 24, 1909, Thomas F. Farrell, register of the Circuit Court for the County of Wayne in chancery, signed as such register a document of which a copy appears on page 152 of the printed record in the rate case, with copy may be used as if set forth in this finding.

In answer to the thirty-third request, I find that on the second day of December, 1909, a stipulation was signed as appears by a copy found on page 153 of the printed record in the rate case which copy may be used as if set forth in this finding.

In answer to the thirty-fourth request I find that on the twenty-fourth day of January, 1911, the attorneys for said Detroit & Mackinac Railway Company and intervening complainants in the chancery proceedings instituted in the Circuit Court for the County of Wayne to review the orders of the said Michigan Railroad Commission, made and filed in said court and cause a motion for a rehearing which said motion came on to be heard before Judge Murfin on the eleventh day of February, 1911, whereupon certain statements were made and proceedings taken in respect to said motion and the same was denied as appears on pages 785-790 of the printed record in the rate case which copy may be used as if set forth in this finding.

The thirty-fifth request is denied.

The thirty-sixth request is denied.

The thirty-seventh request is granted, and I therefore find that the defendant made and filed answers to the several petitions
250 or complaints before the Michigan Railroad Commission which said answers are contained in the printed record of the rate case, said answers being found on pages 4-8, 11-16, 21 of such printed record, the same to be treated as if set forth in this finding.

The thirty-eighth request is refused for the reason that the force

and effect of the stipulations are explained more clearly and accurately by the stipulations themselves than by the thirty-eighth request, and because the stipulations need no explanation by the court.

The thirty-ninth request is granted and I hereby find that whenever reference is made to the printed record in the rate case it is understood that the same applies to the printed record offered in evidence herein as Exhibit 1, being a copy of the printed record filed in the supreme court of Michigan in the case reported in 171 Mich. 335.

The fortieth request is refused.

The forty-first request is refused.

The forty-second request is refused.

The forty-third request is refused.

The forty-fourth request is refused.

L. P. COUMANS,
Circuit Judge.

251 *Judgment Entry and Ruling on Motion for Double Damages.*

(Filed November 27, 1916)

On November 27, 1916, an order was entered denying plaintiff's motion for double damages and entering judgment for plaintiff in the sum of $25,788.76.

Exceptions to Denial Double Damages.

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY Co., Defendant.

(Filed November 27, 1916)

Now comes the said plaintiff and excepts to the order of the court denying plaintiff's motion to double the damages sustained by plaintiff herein in whole or in part.

GILLETT & CLARK,
Attorneys for Plaintiff.

252 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

Cal. No. 10211.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10216.

RICHARDSON LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10220.

ISLAND MILL LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10221.

MICHIGAN VENEER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Cal. No. 10222.

CHURCHILL LUMBER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Exceptions.

253 Now comes the defendant in the causes and court above entitled and takes exception to the opinion, findings of fact and conclusions of law made and filed therein by the court and the judge thereof as of date November 13, 1916. This general exception is in addition to and made a part of the exceptions made and filed on behalf of defendant of date November 15, 1916.

The defendant further comes into this court and alleges that the specific exceptions made on behalf of defendant November 15, 1916, in the cause above entitled as Fletcher Paper Company plaintiff, vs.

Detroit & Mackinac Railway Company, defendant, Cal. No. 10211, each and all of them apply to each and every one of the five several suits and actions hereinbefore entitled.

This defendant by its attorney and counsel pursuant to the rules of this court and the statutes controlling the same, further comes into this court and alleges exceptions to the opinion, findings of fact and conclusions of law made and filed in each of the several causes above entitled, being the additional findings of fact specifically set forth by and on behalf of plaintiffs by their attorneys, in thirty-six (36) specifically numbered paragraphs having been made and signed by said court and the judge thereof and filed in the several causes above entitled on, to-wit; the 27th day of November, 1916.

This defendant further comes into this court by its attorneys and counsel and alleges exceptions to the additional findings of fact in the case of Richardson Lumber Company, a corporation, plaintiff, vs. Detroit & Mackinac Railway Company, a corporation, defendant, Cal. No. 10216, said additional findings of facts consisting of thirty-four (34) specifically numbered paragraphs asserted to be applicable to the cause last referred to, which said findings of fact were made by this Court and signed by the judge thereof and filed in this
254 cause, on to-wit, the 27th day of November, 1916.

This defendant further comes into this court by its attorney and counsel and alleges exceptions to the additional findings of fact in the case of Island Mill Lumber Company, a corporation, plaintiff, vs. Detroit & Mackinac Railway Company, a corporation, defendant, Cal. No. 10220, said additional findings of facts consisting of 34 specifically numbered paragraphs asserted to be applicable to the cause last referred to, which said findings of fact were made by this Court and signed by the judge thereof and filed in this cause on, to-wit, the 27th day of November, 1916.

This defendant further comes into this court by its attorney and counsel and alleges exceptions to the additional findings of fact in the case of Michigan Veneer Company, a corporation, plaintiff, vs. Detroit & Mackinac Railway Company, a corporation, defendant, Cal. No. 10221, said additional findings of facts consisting of thirty-four specifically numbered paragraphs asserted to be applicable to the cause last referred to, which said findings of fact were made by this Court and signed by the Judge thereof and filed in this cause on, to-wit, the 27th day of November, 1916.

This defendant further comes into this court by its attorney and counsel and alleges exceptions to the additional findings of fact in the case of Churchill Lumber Company, a corporation, plaintiff, vs. Detroit & Mackinac Railway Co., a corporation, defendant, Cal. No. 10222, said additional findings of facts consisting of thirty-four specifically numbered paragraphs asserted to be applicable to the cause last referred to, which said findings of fact were made by this court and signed by the judge thereof and filed in this cause on, to-wit; the 27th day of November, 1916.

255 This defendant further comes into this court by its attorney and counsel and alleges exceptions to the refusal of this

court and the judge thereof to grant the defendant's request as follows:

First.

Defendant alleges exceptions to the refusal of this court to grant defendant's 1st, 2nd, 3rd, 4th, 5th, 6th and 7th requests for findings of fact and conclusions of law as specifically set forth in behalf of defendant in such requests.

Second.

This defendant further alleges exceptions to the refusal of this court to grant defendant's eighth request and excepts to the finding of this court in connection with said eighth request as follows:

"Defendant was given an opportunity to submit proofs at the close of proofs offered by plaintiffs. Defendant then made an offer to submit proof of certain facts which I have determined to be inadmissible, and I have, therefore, sustained the objection to such offer.

The evidence relied upon by plaintiffs is apparently undisputed and counsel for all parties stated in open court that a jury was waived because the questions to be decided were entirely questions of law. I have no desire to exclude any competent evidence in behalf of defendant, but in view of my understanding of the situation as above explained, I think that the eighth request should be refused, and therefore, refuse the same. Defendant's rights will be protected by the inclusion in the record of defendant's offer of proof made at the close of plaintiff's evidence."

The defendant excepts to the finding and statement of the court as above quoted.

256

Third.

In like manner the defendant now here excpts to the refusal of the court to grant the defendant's ninth, tenth and eleventh requests.

Fourth.

In like manner the defendant excepts to the refusal of the court to grant the defendant's twelfth request and excepts to the statement of the court in connection with such twelfth request as follows:

"In respect to the twelfth request the special counts of plaintiffs' declarations show to what extent plaintiffs rely upon the statute and to what extent upon the common law.

The nature of proofs submitted by plaintiffs shows that the claims made by plaintiffs upon this hearing are based upon these special counts, and there has been no indication of any other or inconsistent claims based upon the common counts or otherwise. Plaintiffs are not taking inconsistent positions, and I see no ground for requiring any election. The twelfth request is therefore refused."

Fifth.

In like manner the defendant excepts to the refusal of the court to grant its thirteenth request.

Sixth.

In like manner the defendant alleges exception to the refusal of the court to grant its fourteenth request and excepts to the statement made in connection therewith on behalf of the court as follows:

"The circumstances which will authorize proceedings pursuant to Section 10 of Act 300 of 1909 are the circumstances mentioned in that section. The same is true with respect to Section 22 of
257 the Act. Except as herein stated the fourteenth request is refused."

Seventh.

In like manner the defendant excepts to the refusal of the court to grant its fifteenth request.

Eighth.

In like manner the defendant excepts to the refusal of the court to grant its sixteenth request.

Ninth.

In like manner the defendant excepts to the refusal of the court to grant its seventeenth, eighteenth and 19th requests.

Tenth.

In like manner the defendant excepts to the refusal of the court to grant its twentieth request and excepts to the statement of the court in connection with such refusal as follows:

"I find as requested by the twentieth request so far as concerns the effect of the demurrer and the proceedings thereon upon my decision of the case, and state that my decision has been formed independently and has not been controlled by the opinion on the demurrer. The language of the twentieth request is possibly too broad to be precisely accurate, and I therefore make my finding in this form rather than in an unqualified granting of the request."

Eleventh.

In like manner the defendant excepts to the refusal of the court to grant its twenty-first request.

258 Twelfth.

In like manner the defendant excepts to the refusal of the court to grant its twenty-second request and excepts to the finding of the court with reference thereto, wherein the court states as follows:

"Twen-y-second request is refused, and in respect to the subject of such request, I find that the hearts of veneer logs are to be treated like slabs and sawdust, as incidental by-products which can be ignored in considering the re-shipment of the manufactured product.

Thirteenth.

In like manner the defendant excepts to the refusal of the court to grant its twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth and twenty-ninth requests.

Fourteenth.

In like manner the defendant excepts to the refusal of the court to grant its 30th request and excepts to the statement of the court in connection therewith as follows:

"In regard to the thirtieth request, it is impossible to generalize accurately in a few lines in respect to the application of section 22 of the statute. The section is plainly expressed and no generalization in regard to its application is necessary for the determination of this case."

Fifteenth.

In like manner the defendant excepts to the granting of a modification of its thirty-first request and excepts to the statement of the Court in connection therewith as follows:

"The thirty-first request is granted except that I consider
259 it unnecessary and inadvisable to attempt to state the substance of any document of importance, otherwise than by literal quotation. I, therefore, find as follows in answer to the thirty-first request:

On the 20th day of November, 1909, Hon. Henry A. Mandell made an order in the so-called Rate Case, a copy of which order appears on page 123 of the printed record in said Rate case, which copy may be used as if set forth in this finding."

To the extent that the foregoing finding conflicts with the defendant's thirty-first request, defendant excepts thereto.

Sixteenth.

Wherein the statement of the court and its finding with respect to defendant's thirty-second request is modified by the court, exception is taken thereto, and in like manner defendant excepts to the statement and modified finding of the court wherein the court in reference to said thirty-second request states:

"In answer to the thirty-second request and in pursuance of a stipulation admitting the printed record in evidence as proving itself and its contents, with the same effect as if duly authenticated and certified, I find that on November 24, 1909, Thomas F. Farrell, Register of the Circuit Court for the County of Wayne, in Chancery, signed as such register a document of which a copy appears on page 152 of the printed record in the Rate case, which copy may be used as if set forth in this finding."

Seventeenth.

In like manner defendant excepts to the court's refusal to grant its thirty-third request as therein set forth and excepts to the
260 court's finding whereby he limits the same as follows:

"In answer to the thirty-third request, I find that on the 2nd day of December, 1909 a stipulation was signed as appears by a copy found on page 153 of the printed record in the Rate case, which copy may be used as if set forth in this finding."

Eighteenth.

In like manner the defendant excepts to the refusal of the court to grant its thirty-fourth request and excepts to the court's modification thereof in the following language:

"I find that on the 24th day of January, 1911, the attorneys for said Detroit & Mackinac Railway Company and intervening complainants in the chancery proceedings instituted in the Circuit Court for the County of Wayne, to review the orders of said Michigan Railroad Commission, made and filed in said court and cause a motion for a rehearing, which said motion came on to be heard before Judge Murfin on the 11th day of February, 1911, whereupon certain statements were made and proceedings taken in respect to said motion, and the same was denied as appears on pages 785-790 of the printed record in the Rate case, which copy may be used as if set forth in this finding."

Nineteenth.

In like manner the defendant excepts to the refusal of the court to grant its thirty-fifth and thirty-sixth requests.

Twentieth.

In like manner the defendant excepts to the refusal of the court to grant its thirty-eighth request and in stating in connection therewith:

"The thirty-eighth request is refused for the reaso.. that
261 the force and effect of the stipulations are explained more clearly and accurately by the stipulations themselves than by the thirty-eighth request, and because the stipulations need no explanation by the Court."

Twenty-First.

In like manner the defendant excepts to the refusal of the court to grant its 40th, 41st, 42d, 43d and 44th requests.

Twenty-Second.

Defendant by its attorney and counsel alleges exceptions to the refusal of the court to pass specially on the requests and points made on behalf of defendant by their first, second, third, fourth, fifth,

sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-fifth, thirty-sixth, fortieth, forty-first, forty-second, forty-third and forty-fourth requests as presented to the court and duly filed on the 27th day of November, 1916.

It is contended on behalf of the defendant that it was the duty of the Court to take each of said requests and traverse the same, specially indicating the court's reasons for denying the same, and specially passing judgment upon the points and questions raised in such requests, whereby the defendant and the parties to the several suits became and were apprised of the court's judicial determination of such points and questions.

By reason of the court's refusal to so pass specially upon such requests, defendant now here takes exception thereto.

262 Twenty-Third.

Exception is taken by and on behalf of the defendant by reason of the fact that the court did not specify in writing the facts found and conclusions of law therein upon the requests of the defendant, as required by sec. 14, Act 314, Public Acts 1915, commonly known as the "Judicature Act."

Twenty-Fourth.

Pursuant to Circuit Court rule 45, and pursuant to the statute last hereinbefore referred to, defendant by its attorneys and counsel requested the court in writing by forty-four (44) several written requests for findings of fact and conclusions of law as in said requests contained. That as to all of such requests, excepting, however, the eight, twelfth, fourteenth, fifteenth, sixteenth, nineteenth, twenty-second, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-seventh, thirty-eight- and thirty-ninth of such requests the court passed upon such requests with the words "Request is refused", and did not make any findings of fact nor conclusions of law in reference thereto. Wherefore, the defendant excepts thereto contending that it became and was the duty of the court to review such requests, and the subject-matter of each of such requests, and thereafter, in writing, indicate the judgment, opinion and finding of the court as to the facts called for by such requests, and for the conclusions of law called for by such requests.

Twenty-Fifth.

Defendant, by its attorneys and counsel, made, filed and presented to the Court in the causes above entitled, before judgment was entered therein, requests, asking the court to find specially on each of such requests as to the facts and conclusions of law which
263 the court declined to do. It further became the duty of the court to pass upon such requests as herein indicated in writ-

ing, and forthwith file the same with the clerk of the court and enter judgment thereon. By reason of the failure of the court so to do, the defendant now here excepts to the same.

Independent of the proposed findings of facts and conclusions of law, and independent of the written requests made on behalf of defendant for special findings of fact and conclusions of law; in open court the motions heretofore made on behalf of defendant requiring the plaintiffs to elect under what law or procedure they demanded judgments, such motion was denied, and exception now here taken thereto.

Also in open court the motion to dismiss the proceedings and render a verdict in each case of no cause of action was overruled and denied by the court; exception on behalf of the defendant is hereby taken to such ruling.

Further, in open court and as part of the proceedings had and taken in the several causes hereinbefore entitled, the proposed findings of fact and conclusions of law, and amendments to the findings of fact and conclusions of law proposed on behalf of the plaintiffs were all granted by the court, by reason whereof on behalf of defendant exception is hereby taken.

Also by reason of the fact in open court the requests made by and on behalf of the defendant for findings of fact and conclusions of law were overruled and denied by the court; exception is therefore now here taken on behalf of defendant.

Dated this 29th day of November, 1916.

JAMES McNAMARA,
HENRY & HENRY,
Attorneys for Defendant.

264 To Messrs. Gillett & Clark, Attorneys for Plaintiffs in the several causes above entitled.

SIRS: Take notice, that the foregoing is a true copy of the exceptions made and taken by and on behalf of the defendant, the original whereof has been filed in such court and causes, if for any reason the foregoing exceptions are not explicit enough, or if for any reason it is required on behalf of the plaintiffs that exceptions be taken in detail to the allowance of the proposed amendments to facts and conclusions of law on behalf of the plaintiffs, and the refusal of the court to grant the several requests by and on behalf of the defendant, by indicating the same, such further, more specific and more in detail exceptions will be made, filed and served.

Respectfully submitted,

JAMES McNAMARA,
HENRY & HENRY,
Attorneys for Defendant.

STATE OF MICHIGAN,
County of Alpena, ss:

Guy D. Henry, being duly sworn, deposes and says that he served a copy of the foregoing exceptions and notice to the plain-

tiffs' attorneys by mailing the same to them to their business address, Bay City, Michigan, on the 30th day of November, 1916, at Alpena, Michigan, the same being so mailed as first-class matter, postage fully prepaid.

GUY D. HENRY.

Subscribed and sworn to before me this 30th day of November, 1916.

MARIE REINKE,
Notary Public, Alpena County, Michigan.

265 My commission expires August 30th., 1920.

Motion for New Trial with Notice and Mr. McNamara's Testimony.

(Filed Jan. 13, 1917)

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

The following motion will apply to and be considered in connection with the four other so-called "refund cases" all tried by stipulation in connection with the above entitled cause, such other four cases being as follows:

Richardson Lumber Co., v. D. & M. Ry. Co. No. 10216.
Island Mill Lumber Co. v. D. & M. Ry. Co. No. 10220.
Churchill Lumber Co. v. D. & M. Ry. Co. No. 10221.
Michigan Veneer Co. v. D. & M. Ry. Co. No. 10222.

In all of which said cases judgments were rendered in said court on the trial of said causes before Honorable Louis P. Coumans, then judge of said court, on to-wit: the 27th day of November, A. D. 1916.

Now comes the defendant, the Detroit & Mackinac Railway Company, in the cases hereinbefore designated, by James McNamara and Henry & Henry, its attorneys, with Messrs. Weadock & Duffy and Fred A. Baker, of counsel, and moves the Court to make
266 an order in each of said cases setting aside the judgments rendered therein in said court, and to grant to the defendant a new trial thereof in each of said cases for the following reasons:

1. Because the judgments referred to were unauthorized by Act 300 of the Public Acts of 1909 and amendments thereto.

2. Because the court erred in overruling the motion made on be-

half of defendant in each of said cases to dismiss the same at the conclusion of the proofs submitted.

3. Because the three orders made by the Michigan R. R. Commission of date Oct. 19, 1909, Oct. 22, 1909, and November 3, 1909, declared upon by plaintiff and made the basis of recovery of the judgments, were void and of no force and effect.

4. Because the Court erred in overruling defendant's motion that he plaintiffs be required to elect whether they relied upon the act last referred to herein, or on the common law counts.

5. Because the Court erred in its construction of Sections 10, 16, 18, 22, 25 and 26 of Act 300 of the Public Acts of 1909 with amendments.

6. Because these cases were tried before Honorable Louis P. Coumans, circuit judge of said court without a jury, such trial commencing on the 19th day of September, 1916 and continued until the 23d day of September, 1916. Thereafter the attorneys for the parties respectively prepared their requests for findings of fact and conclusions of law and submitted the same to the court with arguments, on the 27th day of November, 1916.

That on the day of argument of such requests, the said Honorable L. P. Coumans stated as follows:

"Now, it may be some advantage to the defendant in this case to have it appear of record that it would be utterly impos-
267 sible for the Court with the limited time he can sit here as a court, to take this case and go through it and give satisfactory reasons and the various requests that have been made by the defendant, if he overrules them, and whatever is done has got to be done today or not later than tomorrow, as the changed conditions here will make that necessary. The Court will retire probably the day after tomorrow. I am not advised as to the exact time, but Mr. Houghton told me a week ago and the record can show that he succeeds me here as judge, that he would not qualify until the first of the month. I have been informed since that time that he is to qualify on the 29th of this month, so that I don't see how I could, even if inclined to do so, go into the matter any more elaborately. If I deny these requests and show reasons for them than as stated in the findings Mr. Clark has filed here to be adopted, if I adopt them,—I want to get this matter off my hands and I think it is to the interest of everybody to close it up now and not be submitted to Judge Houghton, or somebody afterwards, because it will cause undoubtedly a lot of time and delay and it seems to me that the court of last resort in this state will be able to protect the rights of the defendant fully because you have your requests there covering, as I read it, every phase of the case known to me, and if they are denied you are square on your rights. To get the matter in the condition I think it should be in, I shall sign the findings as prepared by the plaintiff with the addition of forty-third and forty-fourth requests which were refused.

Mr. McNamara: As I understand, your honor will enter an order denying all of our requests. What we object to is adopting the language of Mr. Clark in explanation of certain requests.

The Court: Well, the Court will say that while that is the language of Mr. Clark, I have gone over those and have had
268 that paper before me for several days, and I will adopt that as my own language in the cause and the additional findings that Mr. Clark asks for will be filed and allowed.

Mr. McNamara: Then the other paper that Mr. Clark prepared with reference to our findings, I understand the Court adopts that too?

The Court: Yes, adopts that, and to make your record right, you want to add that the forty-third and forty-fourth request is refused."

The Court also at said time denied each and every objection made on behalf of the defendant to plaintiff's requests for findings of fact and conclusions of law, and adopted and granted each and every request presented by and on behalf of the plaintiffs for findings of fact and conclusions of law. Likewise the Court adopted and granted each and every objection made by and on behalf of the plaintiffs to the findings of fact and conclusions of law of the defendant, so that judgment was entered by the Court on the 27th day of November, 1916 at the conclusion of arguments, whereby the court adopted and granted all of plaintiffs' requests and all of plaintiffs' objections to defendant's requests, and denied all of the defendant's requests and denied all of defendant's objections to plaintiffs' requests.

7. Because the Court erred in failing to comply with Circuit Court Rule 45 in that the Court did not pass specially on any or all points respecting requests on behalf of both parties for findings of fact and conclusions of law, but instead thereof, adopted the language used by the attorneys for the plaintiffs, without comment, judgment, consideration or opinion other than by signing the papers prepared on behalf of the plaintiffs, except as above stated, and except other comments of like kind.

269 8. Because the Court erred in not complying with the request of the attorneys for the defendant by passing specially upon all points and requests for findings of fact and conclusions of law in behalf of defendant.

9. Because the Court by reason of the expiration of his office as judge of the Circuit Court for the County of Bay, did not and could not consider or pass judicially upon the numerous requests and objections made by the parties respectively through their respective attorneys.

10. Because the defendant in each of said cases is entitled to the deliberate judgment and legal consideration of the Circuit Judge and the Circuit Court in and for the County of Bay, which legal judgment and consideration was not given to the numerous questions and requests by reason of the fact that the judge who heard said cause was incapable of so doing on account of the termination of his office as such judge.

This Motion is based upon the files and records in this cause, upon the testimony taken therein, and upon all the proceedings had and taken upon which such judgments were rendered.

11. Because on the trial of said cases it was the belief of the attorneys for both parties that Exhibit "1," known as the printed record in the Rate Case, contained all of the original record as appealed from the Circuit Court for the County of Wayne to the Supreme Court of the State of Michigan, such appealed case being reported in 171 Mich. 335.

That on the trial of the case of Frank W. Gilchrist Estate vs. Detroit & Mackinac Ry. Co. in the Circuit Court for the County of Alpena (being a case like the said cases above enti-led with
270 but few exceptions) it developed from the introduction of the original files of the case so appealed to the supreme court, that said printed record did not contain all of such files and records; that on the introduction of such original files certain facts relating thereto were established by the testimony of Mr. James McNamara, attorney for defendant, a copy of which said testimony with such explanation and such files being hereto annexed and made a part of this motion. That because of the misunderstanding on the part of all of the attorneys on the trial of said cases in Bay City, and by reason of the discovery of such evidence which is material and necessary in support of the defense made by defendant in such cases, such judgment should be set aside and defendant should be granted a new trial.

This motion is based upon the files and records in this cause, upon the testimony taken therein and upon the testimony given by James McNamara in the trial of the case of Frank W. Gilchrist Estate, plaintiff, vs. Detroit & Mackinac Railway Company, in the Alpena Circuit Court, on the 9th day of January, 1917, a copy of which testimony with the files and records introduced in said cause in connection with this testimony, being hereto annexed and made a part of this motion. Also upon the affidavit of A. H. Briggs, official stenographer for the Circuit Court of Alpena County, hereto annexed and made a part of this motion.

Respectfully submitted,

JAMES McNAMARA,
HENRY & HENRY,
Attorneys for Defendant.

Dated this 22d day of January, 1917.

271 *Testimony of James McNamara.*

Given in Gilchrist Refund Case, January 8, 1917, Alpena, Michigan.

JAMES MCNAMARA sworn for Defendant.

Examined by Charles R. Henry, testified:

I am a practicing attorney and reside at Detroit, Michigan, and am one of the counsel for the Detroit & Mackinac Railway Co.

I have had charge of the litigation in the so called rate Case from its inception to the present time.

Q. I show you a package of files here in the Rate Case and ask you to designate what they are?

A. This is the enrolled record of the case of Detroit & Mackinac Railway Co. vs. The Michigan Railroad Commission, Wayne Circuit Court file No. 35866, Supreme Court file No. 24650 and is the record in the Supreme Court of the so-called Rate Case that we are talking about.

The last page is a certificate made by the Register in chancery of Wayne County to the effect that these papers are the original bill, process, answer, replication and all other pleading, processes, motions, notices, orders and decrees in said cause, with the original testimony taken before a commissioner, also copy of all journal and calendar entries.

I obtained these papers from the clerk of the Supreme Court. He sent them to the Wayne Circuit Court and I obtained permission from presiding Judge Hosmer of that court to bring them here for the purposes of this litigation.

Q. What is the practice in Wayne circuit as to issuing injunctions and making orders for them?

272 A. All injunctions in the Wayne Circuit Court are issued by the order of the presiding judge in chancery; when he makes such order it is taken to the county clerk and all injunctions that are made out by the county clerk are entitled in the name of the presiding judge over all divisions of court, and then the stamp is placed upon the injunction showing by whose order it was issued, although given in the name of the presiding circuit judge. At the time this injunction was issued Judge Hosmer was presiding judge.

Q. State briefly such facts which do not appear of record relative to obtaining the order before Judge Mandell.

A. After the preparing of the bill of complaint I attached to it the order to show cause which is signed here by Judge Mandell and dated the 20th day of November, 1909, which was made returnable November 24, 1909, at nine thirty A. M. It is signed by Judge Mandell himself, under his signature "Circuit Judge presiding in chancery division of Wayne Circuit Court." He was the only one that could issue such an order at that time.

On the 24th of November I appeared in court and told Judge Mandell what I was there for. He asked if I had served a copy of the bill of complaint. I told him I had and read to him my certificate of service, showing that I had served it myself upon Samuel H. Kelly, secretary of the Michigan Railroad Commission, within the time named in the order to show cause.

He said he was very loathe to issue an injunction in the matter without having some one from the Attorney General's office present. I then called his attention to the fact that we only had twenty days under the statute within which to perfect our appeal, and that I was afraid I would lose my rights under the statute if I did
273 not have my injunction within that time. That while I had no objections to giving the Attorney General's office all the time they wanted, that I ought to have and should have and must

have an injunction on that day in order to preserve my rights in the matter.

So he said, "All right, you draw up the order." I sat down at the desk in the court room and this order is in my own handwriting and on a legal sheet of paper as I drew it up. Meantime Judge Mandell telephoned the attorney general's office, obtained Mr. McGill on the phone, who said that he would be in court on the 27th.

So Judge Mandell in his own handwriting added to my *my* writing, where I had it—added there that:

"Said injunction to continue in full force and effect until the hearing on the said order to show cause on Saturday, Nov. 27, 1909, and until the further order of this court."

The order reads as follows:

No. 35866.

"DETROIT & MACKINAC RAILWAY COMPANY, Complainant,

vs.

MICHIGAN RAILROAD COMMISSION, Defendant.

At a Session of the Circuit Court for Wayne County, Chancery Division, held at the county building in the City of Detroit, Michigan, on Wednesday, the 24th Day of November, A. D. 1909.

Present, Hon. Henry A. Mandell, circuit judge.

On reading the bill of complaint heretofore filed in this cause, and on reading and filing due proof of service of a copy of said bill of complaint and the order to show cause attached thereto
274 on the Michigan Railroad Commission, wherein said Michigan Railroad Commission was ordered to show cause in this court on Wednesday, the 24th day of November, A. D. 1909, at 9:30 o'clock in the forenoon of said day, why an injunction should not issue as prayed for in complainant's bill of complaint; and after hearing James McNamara, solicitor for complainant, said defendant failing to appear, it is ordered by the court now here that a temporary injunction issue as prayed for in complainant's bill of complaint."

Now added to that in the handwriting of Judge Mandell is the following:

"Said injunction to continue in full force and effect until the hearing on said order to show cause on Saturday, November 27, 1909, and until the further order of the court.

Dated, November 24, 1909.

HENRY A. MANDELL,
Circuit Judge."

I took that order down to the county clerk's office and filed it there and on the back of it it shows the filing: "Filed Nov. 24, 1909. George Humbert, deputy clerk. Entered No. 27, page

106." Initials "Z. C. B." Then under that is a stamp "Compared," and the initials "H. A. C."

After that order was filed I asked for the injunction, and they handed me a blank injunction and I sat down in the clerk's office and made it out myself on that blank.

This injunction contained, of course, the name of Geo. S. Hosmer, at that time presiding over all courts in Detroit, and was dated November 24, that same day.

I took the order right down to the clerk's office and drew it up myself. Then the clerk stamped on that with a stamp in
275 green ink, "This injunction is issued on order of Judge Mandell."

That is the usual procedure there. Of course, it was Judge Mandell that gave the order. I interviewed the clerk last week, John Russell Fisher. He put that stamp on and remembers all the circumstances in connection with it, and told me that was the regular order and the method of procedure in the clerk's office after you got your order. The injunction itself reads as follows:

"STATE OF MICHIGAN:

"The Circuit Court for the County of Wayne. In Chancery.

"To the Michigan Railroad Commission and to its counsellors, attorneys, solicitors and agents and each and every of them, greeting:

"Whereas, it has been represented to us, in the circuit court for the county of —, in chancery, on the part of Detroit & Mackinac Railway Company, that it has lately exhibited its bill of complaint against you, the said Michigan Railroad Commission, defendant, to be relieved, touching the matters therein complained of; in which bill it is stated amongst other things that you are combining and confederating with others to injure the said complainant touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly command you, the said Michigan Railroad Commission, and the persons before mentioned, and each and every of you, under penalty of ten thousand dollars, to be levied on your lands, goods and chattels, to our use, that you do absolutely desist and refrain from putting into operation or making effective, three orders of said Michigan Railroad Com-
276 mission directed to the Detroit & Mackinac Railway Company, said complainant, dated respectively October 22nd, 1909, October 19th, 1909, and October 19th, 1909, shown and set forth in complainant's bill of complaint as Exhibits one (1), two (2) and three (3), which said orders undertake to make a new tariff for the transportation of logs in carload lots to the city of Alpena over the Detroit & Mackinac Railway Company, other than

the ones now in force and effect on said complainant's railroad, until the further order of this court.

"Witness the Honorable George S. Hosmer, circuit judge, and the seal of said circuit court of Detroit, Michigan, this 24th day of November, A. D. 1909.

THOMAS F. FARRELL,
Register,
"By GEORGE HUMBERT,
Deputy Register.

"JAMES McNAMARA,
"Solicitor for Complainant.

"1233 Majestic Building, Detroit, Michigan."

Entitled on the back, this injunction is "No. 35,866. The circuit court for the county of Wayne, in chancery.

"Detroit & Mackinac Railway Company, complainant, vs. Michigan Railroad Commision, defendant. Injunction." And across is in a big stamp, it says "Entered." And then it is stamped, "Filed, December 3rd, 1909. John R. Fisher, deputy clerk." And under that, "James McNamara, solicitor for complainant." And then with a green stamp, "This injunction is issued on order of Judge Mandell."

Mr. Henry: Your honor, we offer the order of Judge Mandell, the one read before this injunction, in evidence, and will have it identified as Exhibit 1.

The Court: Yes.

277 Mr. McNamara: After this injunction was issued I sent it down to the sheriff of Ingham county at Lansing, and told him to serve it upon some member of the Railroad Commission or the secretary of the Railroad Commission, and on the back of this injunction is the following:

"STATE OF MICHIGAN,
County of Ingham, ss:

"I hereby certify and return that on the second day of December, A. D. 1909, at the city of Lansing, I served the within writ of injunction on Samuel H. Kelley, secretary of the Michigan Railroad Commission, named therein, personally, by them and there showing to the said Samuel H. Kelley, secretary of the Michigan Railroad Commission, the said injunction, with the seal impressed thereon, and deliverd to him a true copy thereof.

"(Signed), O. L. Lathrop, deputy sheriff for Ingham county.
"My fees, $2.50."

Mr. Henry: May the order be received, your honor, in evidence?

The Court: The order is received as Exhibit 1.

Mr. Henry: I offer the injunction with the other matters read by the witness in evidence and for identification have it indicated as Exhibit 2.

The Court: Yes.

Mr. Clark: No objection.

Mr. Henry: May it be understood as these are the original files that copies may be substituted?

278 Mr. Clark: Yes, make copies from these. He has read them into the record, anyway.

The Court: I notice some slight discrepancies between——

Mr. Clark: There are. I was just looking at this to see if that was a copy or not. It is not. The date October 19 is in here twice. November 3 isn't here.

A. Yes.

The Court: That is what I intended to call attention to.

Mr. McNamara: Yes.

The Court: The other discrepancies are of no consequence.

A. But it identifies them further by Exhibits 1, 2 and 3.

Mr. Clark: I have no objection to the reception of these documents and no objection to having copies in the record. I think that they should be copied from these documents that have been produced however, and not from the printed copy.

Q. Turn to the stipulation that you have referred to, the stipulation of Judge Bird. Have you the stipulation?

A. I have.

Q. I think you stated pretty fully how that came about. I wish you would state before you read that, just how Judge Bird came to sign it?

A. On the 27th of November, 1909, Mr. Charles W. McGill came to Wayne circuit court, appeared there before Judge Mandell and stated to Judge Mandell that Mr. Bird, the attorney general,

279 was at Washington, and had not returned yet; and that he was very anxious to have him appear in the case in opposition to this injunction; and Judge Mandell asked him when he would return. He told him that he thought he would be there on the 2nd; and I am not certain now what day of the week the 2nd of December, 1909, was on, but anyway the matter was held open until that day for Judge Bird to appear to oppose this injunction, if he desired to do so.

On the morning of the 2nd of December, Judge Bird came to my office and asked what the case was about; and I sat down with him and went over the case and told him all about it; told him what had been done.

He was very familiar with what had been done, but he wanted to know something about the merits of the case, and I told him.

And he said that so far as he was concerned he would not appear against the injunction that was issued in the case and that I could draw up a stipulation to that effect continuing that injunction in full force and effect until this case was finally disposed of on its merits in the courts, and I called my stenographer and I dictated

that stipulation in the presence of Judge Bird and we both signed it.

The stipulation reads as follows:

"State of Michigan. The Circuit Court for the county of Wayne, in Chancery.

"The Detroit & Mackinac Railway Company, complainant, vs. Michigan Railroad Commission, defendant. No. 35,866.

"It is hereby stipulated by and between the attorneys for the respective parties hereto, that the application for an injunction and the order to show cause made by said court, and the hearing
280 thereon, may be and is hereby continued in its present state, until the final determination of said cause upon the merits thereof.

"(Signed),

"JOHN E. BIRD,
"Attorney General.
"JAMES McNAMARA,
"Attorney for the Plaintiff.

"Dated this 2nd day of December, A. D. 1909."

I took that over to the court and showed it to Judge Mandell and told him that there would be no hearing on that matter; it was all settled; and I took it down and filed it in the county clerk's office. And it contains on the back of it: "No. 35866, Wayne Circuit Court, Chancery, Liber No. 9, page 420. Detroit & Mackinac Railway Co. vs. Michigan Railroad Commission. Stipulation continuing present injunction in its present status until hearing on the merits. Filed December 3rd, 1909. John R. Fisher, deputy clerk. James McNamara, solicitor for complainant."

Q. Mr. McNamara, will you please submit the signature to the court?

The Court: I don't doubt it.

Mr. Clark: We don't question them.

Mr. Henry: That is the first time it ever appeared. You don't care to see it?

Mr. Clark: No.

Mr. Henry: Then, your honor, we offer this stipulation in evidence, Exhibit 3.

281 Mr. Clark: No objection.

(Witness continues.)

At the time I was talking this matter over with Judge Bird and determining upon the stipulation to be entered into, I had had to that date the exclusive management of this rate case for the defendant, and Attorney General Bird had the management of the case and appeared for the commission.

Q. I ask you to state in the discussion with Attorney General Bird at that time, whether it was expressed that the intent of the injunc-

tion and stipulation was to prevent the rate of the commission from going into effect until the determination of the case in the courts, and would not date back from that time?

Mr. Clark: I object to that as seeking to vary or supplement a written document by parole evidence, and incompetent.

Mr. Henry: He had the management of it; it would be like two parties; and they discussed it; it might throw some light on some latent ambiguity.

The Court: You may take it, anyway.

Mr. Clark: An exception.

A. We went over the case thoroughly and Judge Bird said that if the Michigan Railroad Commission was going to reduce any rates or start reducing rates in this state, he did not propose to have them started on the D. & M. Railroad Company, a small road; and he seemed to be quite familiar with the railroad; and it was understood that that stipulation would suspend the putting of these orders into effect by the Railroad Commission, making them effect-
282 ive in any way, until this case was finally heard upon its merits, and that the Railroad Company should collect its present rate, and the tariff should remain in full force and effect until this case was finally disposed of on its merits, and I had a talk with Judge Bird about that afterwards.

I prepared the bill of complaint in the Wayne Circuit Court.

Mr. Henry: I am now indicating the prayer for relief in the bill of complaint on page 141 and I ask you to look at it, Mr. McNamara, and see if that is the prayer for relief and prayer for process in the bill of complaint.

A. It is. The dates are correctly named as to the order. The dates in the injunction are evidently errors on my part, as I drafted it down at the office of the county clerk, and I evidently repeated October 19, but I fairly indicated that I meant by referring to the exhibits in the bill of complaint as 1, 2 and 3. That is the way they were numbered in the bill of complaint.

The Court: Well, there is another mistake in the bill, itself, isn't there, Mr. McNamara, in the prayer for relief?

Paragraph 3 of the prayer for relief "That the rate fixed by the orders of the Michigan Railroad Commission of October 22, 1909, November 3, 1909 and October 19, 1909?"

A. Yes.

The Court: How are those; are those correct?

A. I think they are.

The Court: How about the order of November 6?

283 A. Well, that is the time that the order was served upon the D. & M. railroad, that wasn't the time it was dated.

The Court: November 6 is the date of service of the order of November 3?

A. Yes. That is it. The order of November 3 was served upon the D. & M. Railroad upon November 6.

Mr. Clark: This prayer for relief that you are looking at here is the amended prayer. It wasn't filed until the 25th of May, 1910, some six months later than the original prayer?

A. The original prayer is there, isn't it?

Mr. Clark: The original prayer is here. It is not in the printed record at all, but it is in the record of the court.

Q. Will you refer to the prayer that asks for an injunction?

A. Well that is the original prayer for relief, yes. That is what I now have before me. It reads as follows:

"The premises being considered, may it please the Court to grant unto this complainant the following relief:

(*a*) That a temporary injunction be issued out of and under the seal of this Honorable Court, directed to the Michigan Railroad Commission, the defendant herein, restraining and strictly enjoining said Commission from enforcing each and all of the three orders heretofore made by said Commission, reducing the freight rates and switching charges of said complainant on its railroad as set forth in Exhibits 1, 2 and 3.

(*b*) That the action of said Michigan Railroad Commis-
284 sion in reducing the freight rates and switching charges on complainant's railroad as set forth in Exhibits 1, 2 and 3 be set aside and held for naught, and that the rates heretofore fixed and published by said complainant in its M. R. C., No. 205, and its M. R. C. No. 208, and its M. R. C. No. 217, be restored by this Court upon a full hearing of the proofs and allegations of said complainant herein.

(*c*) That after a full hearing on the matters and facts contained in this Bill of Complaint such injunction be made perpetual and permanent.

(*d*) That the defendant, the Michigan Railroad Commission, be required to appear and answer this Bill of Complaint, but not under oath (his answer under oath being expressly waived).

(*e*) That this complainant have such other and further relief in the premises as shall be agreeable to equity and good conscience.

May it please the Court, to grant unto this complainant a writ of injunction to be issued out of and under the seal of this Honorable Court, directed to the Michigan Railroad Commission, the defendant herein, restraining and strictly enjoining it, and each of the officers and members of said Commission, from enforcing the orders heretofore made by said Commision, as herein set forth."

A. Counsel has put in some tariff rates here. I am not sure that the so-called shipment discrimination rate was put in; have you it handy there?

A. It is, yes. It was known as the one against which the complaint made by the complainant in this case was lodged, was known as its M. R. Co. No. 275. It was corrected by a new tariff that

equalized the rates between points north of Alpena and
285 south of Cheboygan into Cheboygan, and those south of Cheboygan and north of Alpena into Alpena by tariff known as M. R. C. No. 277 which became effective and was on file in the office of the Mich. Railroad Commission on the 1st day of June, 1909. Now those exhibits are contained in this record; and if they are not there, in my brief. I understood you introduced all those in evidence, didn't you?

Mr. Clark: No, we did not in this case. We will consent to have you use the copies you have there. We don't think the exhibits are material. We object to them on that ground. If they are material in any form, we consent to their use in that form.

The Court: Will you make an exhibit of them, Mr. Henry?

Mr. Henry: I think I will of the Cheboygan.

The Court: It will be No. 4.

A. M. R. C. No. 205 is already in evidence.

The Court: That is in evidence and so is 208. You are seeking now 275.

A. Now, I have got those numbers wrong. I will introduce them. On page 61 of my brief in the Rate Case, Cheboygan rate was known as M. R. C. No. 199 which became effective on January 15, 1909, the rate that was complained of as being unequal. Now I can read that rate into the record. Rates per 1000 feet.

	Per thousand.
From Aloha, Michigan, to Cheboygan	$1.80
From Bunton, Michigan, to Cheboygan	2.00
From Black Lake Quarry (Black Lake Branch)	1.80
286 From Case	2.00
From Clark's Mill (Cleveland Branch)	1.80
From End of Wolverine Branch	1.80
From Gilchrist Spur (Lough Branch)	1.80
From Hurst (Hurst Branch)	2.00
From La Rocque	2.00
From Le Grand	1.80
From Martindale Spur (Tubbs Branch)	2.00
From Millersburg	2.00
From Mill Spur (Indian River Branch)	1.80
From Tower	1.80
From Waveland	1.80

Opposite the names Black Lake Quarry and in the cases at Clark's Mill, End of Wolverine Branch, Gilchrist Spur, Hurst Branch, Le Grand, Martindale's Spur, Mill Spur and Indian River Branch are stars, and below opposite the star it says: "No regular train service. Shipments from these points handled at our convenience only." And the further note: "Issued on less than stat-

utory notice by authority of the Michigan Railroad Commission, Special permission No. 72, Jan. 11th, 1909."

A. That same tariff is to be found on page 454 of the printed record in the rate case, that is known as Exhibit "W", I think, Complainant's Exhibit "W".

That is No. 199.

The next one; on the 20th of May, 1909, the Detroit & Mackinac Railway Company published the following rate to Cheboygan to take the place of M. R. C. 199, to be known as M. R. C. 237 which became effective June 1, 1909, and is known as local Freight Tariff on Logs, all kinds, carloads, Minimum 2500 feet per Car, to Cheboygan, Michigan, from the following points:

The Court: Could you tell us what page in the record
287 that is on?

Mr. McNamara: That is not in the record. It is in my brief on page 62. I am going to leave a copy of this here with you (M. R. C. 237).

From Aloha, Michigan	$3.00
From Black Lake Quarry (Black Lake Branch)	3.00
From Bolton	3.25
From Bunton	3.00
From Case	3.00
From Cathro	3.25
From Clark's Mill (Cleveland Branch)	3.00
From End of Dog Lake Branch	3.00
From End of Kimball Branch	3.25
From End of Wolverine Branch	3.00
From Gilchrist Spur (Lough Branch)	3.00
From Hurst (Hurst Branch)	3.25
From La Rocque	3.25
From Le Grand	3.00
From Martindale's Spur (Tubbs Branch)	3.25
From Metz	3.25
From Millersburg	3.00
From Mills Spur (Indian River Branch)	3.00
From Onaway	3.00
From Polaski	3.25
From Posen	3.25
From Tower	3.00
From Waveland	3.00

A. These are notes, now:

"The rates from intermediate points will be the same as the rates from the next more distant point from which rates are named.

"A refund of fifty (50) cents per thousand feet on logs will be made when an equal amount of manufactured product is
288 shipped out via the Detroit & Mackinac Railway.

No regular train service. Shipments from these points handled at our convenience only.

Issued May 20, 1909. Effective, June 1, 1909."

Q. Mr. McNamara, by the order of Judge Mandell which we have marked Exhibit 1, it was stated that the temporary injunction should remain in force until the 27th day of November, and until the further order of the court. I ask you what, if anything, took place at the hearing of the 27th?

A. The stipulation between Attorney General Bird and myself.

Q. What, if anything, was ever done, other than has been put in evidence in this case to modify, change, or in any way affect Judge Mandell's order, Exhibit "1", or the injunction, Exhibit "2"?

A. Nothing at all. Of course, a mandamus was issued by the Supreme Court. I think that was on the 25th of June, 1912. Up until that time nothing was done to disturb the status of those orders or papers.

Cross-examination.

By Mr. Clark:

Q. I notice the date of service of this injunction at Lansing was exactly the same as the stipulation between you and Judge Bird at Detroit. I assume from that fact that Judge Bird did not have first hand knowledge that that injunction was being served in Lansing on that day. Do you remember whether you told him?

A. Yes, I had a copy of it there and showed it to him.

Q. Can you explain why the stipulation says nothing about the injunction, but refers merely to the order to show cause and the hearing on it?

289 A. Well, the order to show cause was to be heard on the 27th and it was not heard on the 27th. It was adjourned until Saturday the 2d, and it was supposed that at that time we would have a hearing on that order to show cause and the injunction that had been issued under it, with the presence of Judge Bird; but instead he entered into that stipulation with me and I took that over to Judge Mandell and told him that there would be no hearing—further hearing—and that the injunction would stand and I filed that stipulation.

Q. Was there any other reason other than as stated in that answer, why that stipulation referred to the order to show cause and the hearing thereon, and did not refer to the injunction itself?

A. No; it was supposed to refer to the status of affairs that existed just then, up to that time; the order to show cause and injunction was issued at that time.

Redirect examination.

By Mr. Henry:

Did anything take place after Judge Murfin made his decree?

A. Yes; I wanted to call the court's attention to that; that when the decree was prepared in this case by Messrs. Clark & Gillett and presented to Judge Murfin for his signature, Judge Murfin handed it to me and asked me if I had any objection to it. I have it here. I want to show it to the court. And I said I did; that my objection

was—that Judge Bird had a stipulation with me that the injunction that had been issued preventing the Railroad Commission from enforcing or making effective these orders, ran to final disposition of this case on its merits. That we had given notice of an appeal and the case was going to the Supreme Court, and that I did not
290 think that he had any right to dissolve the injunction in this case; and I produced the stipulation and the injunction and order to show cause, and he asked Mr. Gillett what he thought about that and Mr. Gillett examined them and said "Well, he thought that the ordinary procedure was that the injunction would be dissolved with the dismissing of the bill of complaint. And Judge Murfin said, "I don't think that I have any authority whatever to dissolve that injunction under that stipulation" and he struck out from the order handed to him by Mr. Gillett, that part of it that was in there.

Q. You may read the latter — of the decree including the part struck out, and you are now reading from the files?

A. I am now reading from the original decree in this case, dated the 11th day of February, 1911. The decree, the last paragraph of it as submitted by Messrs. Gillett & Clark for the signature of the court, reads as follows:

"Ordered, adjudged and decreed that the bill of complaint as well as the amended bill of complaint filed in this cause be and the same are hereby dismissed with costs to be taxed and that the temporary injunction issued in this cause be and the same is hereby dissolved."

A. After the discussion that I have just testified to, Judge Murfin took his pen and struck out the following words: "And that the temporary injunction issued in this cause be and the same is hereby dissolved."

Q. They are not stricken out so but what we can see them, just one pen line run through the words?

A. Yes.

Q. Are the attorneys indicated in the decree?

A. Yes. This has a back. The back of this decree is No. 35,866. I know it is in the handwriting of Mr. Gillett; I am
291 familiar enough with his handwriting to say that is his own handwriting on the back. It says:

"The Circuit Court for the County of Wayne, In Chancery, Detroit & Mackinac Railway Co. et al., Complainants, vs. Michigan Railroad Commission, et al., Defendants. Decree. "Compared."

After that is stamped on there "H. C. C." and under "compared" "J. A. S." with the stamp "Entered". It is indorsed "Filed February 11, 1911, John A. Seeley, Deputy."

John A. Seeley at that time was the court's deputy—Judge Murfin's deputy in court. He was also a deputy County Clerk. And on the bottom of it and printed, "Gillett & Clark," Shearer Building, Bay City, Mich."

That is on their manuscript cover.

Mr. Henry: We offer that in evidence as Exhibit 5.

Q. After the decree was signed, or before it was signed and after

Judge Murfin's opinion, what steps were taken by the defendant for a rehearing?

A. We made a motion before Judge Murfin for a rehearing of the case and Judge Murfin did not care to hear it because he said,——

Q. I would like to have you read into the record what Judge Murfin said in not hearing the rehearing?

Mr. Clark: This is immaterial. We object to it on that ground. I do not see how it can be prejudicial; it is immaterial, nevertheless.

The Court: Well, read it.

A. On page 789 in the record of the Rate Case, the following proceedings are shown, dated,

292 "Saturday, February 11, 1911."

A. That was the day that the motion for a rehearing that we had previously made was returnable. (Reads:)

Mr. Baker: The primary purpose of making this motion is to put upon the record an objection to the decree of the court.

The way you construe and enforce this statute it violates the constitution of the United States, and in order to get that upon the record in the trial court, as I am bound to do, under the decisions of the Supreme Court of the United States, we make this motion for rehearing. If it had not been for that, we probably would not have made one. I want to present that question to the court, because I think, when you consider the cases that bear upon the subject, you will set aside the decree; you will not grant the decree you have ordered.

The Court: I have studied this case very carefully before disposing of it. I do not want to be at all abrupt in the matter, but, in view of the fact that I am simply a nisi prius court, in view of the fact that the supreme Court of the United States will ultimately have to review this case, I do not believe I will hear your application. I will simply deny it as a matter of form, because I do not believe that a reconsideration of this case—I do not like to be stubborn about it,—but I do not believe a reconsideration of this case would be profitable to anybody. Not that I am shirking the work, because I like it, but, not being a court of last resort, it does not seem to me that my conclusions, as a matter of fact, amount to anything except a gratification in my conscience in having done my duty the best I can, and, it seems to me, you will be better off if I deny your motion, and this is expedited rather than delayed by a reconsideration by the Court.

293 Mr. Baker: There is something to be said in favor of that. But, at the same time it is the duty I apprehend of the trial Court to re-open the subject and dispose of the case according to the best judgment of the Court.

The Court: Well, I have tried to do that.

(The court reads the motion.)

Mr. Baker: I claim the right to be heard here on this application for rehearing.

The Court: This is filed, Mr. Baker, and your record is preserved, and I will deny the application for rehearing. I will hear you gentlemen upon the proposed decree. If you have been able to agree upon it, I will be very much relieved.

The decree was then settled and signed.

I was present at that time and he did not hear either Mr. Baker or myself.

Mr. Henry: May it please the Court, while we may differ as to the materiality of these pleadings, in view of the fact that Mr. Clark has put in this case here the complaints upon which the orders by the Railroad Commission were made, the orders bearing date, October 19, October 22 and November 3, 1909, we would ask the privilege of putting in the answers which were made to the complaints. You see these complaints were filed before the Railroad Commission. Mr. Clark has read the complaints. Then the railroad made answer—made reply to them and then a hearing was had, and in order to get the full matter in, if it is material at all, we offer the answers to those complaints.

294 The Court: That would be the answers of the railroad company, not to any bill of complaint, but to the complaints upon which the orders were finally made?

Mr. Henry: The complaint is on pages 18, 19 and 20 of the printed record of the Rate Case, and the answer commences on page 21.

Mr. Henry: In view of the fact that other complaints are made here upon which the orders have been read into the record, we offer the complaint in case numbered 1 on pages 1, 2, 3, and 4 of the printed record; and the answer thereto on pages 4, 5, 6, 7 and 8.

Also the complaint numbered 2 of Fletcher Paper Company vs. The Detroit & Mackinac Railway Company on pages 9, 10 and 11, and the answer thereto on pages 11, 12, 13, 14 and 15.

Mr. Clark: We object to the proceedings in any other complaint than this as immaterial.

The Court: I think I will receive them.

Mr. Clark: It is understood in this court that on an objection being overruled, the stenographer enters an exception as a matter of course, Your Honor?

The Court: No, it is not, because that would be right in the teeth of the law. By the Judicature Act exceptions are abolished.

Q. After the decision rendered in 171 Mich. 335, what was the next step which you took in these proceedings in the Rate Case?

A. I made application for a writ of error to the United States Supreme Court, and I went down to Lansing with it, and Judge Moore was chief justice at that time, and I gave the matter

295 to Charles C. Hopkins, and he said the judges would be together the next day; that they had come to the conclusion that while the Chief Justice had ordinarily granted writs of error, that hereafter there would be a majority of the court that would consider them before they would be granted. The next day a majority of the Court or more gathered together in the consulting room and

I went in there and presented the matter to them; and Justice Moore said that they were somewhat reluctant in granting the writ of error to the Supreme Court of the United States, unless I would agree to put these—have the railroad company put these orders into effect, and I discussed that matter with them. We had considerable discussion about that, and I gave them my reasons for not wishing to have the Railroad Company do that. So they said they would take the matter under consideration, and they were going to meet the next morning anyway, and if I would stay in town they would see me the next morning at 10 o'clock. So I went back there the next morning at 10 o'clock and the judges were present, and Justice Moore said that they had concluded to grant me a writ of error to the United States Supreme Court, if I would execute a bond for $100,000, and the bond run to the intervening defendants—or intervening complainants in the case; in case that they prevailed in the United States Supreme Court that we would pay them these rates and I told him that that raised a very serious question. I did not believe that under the law they were entitled to have these rates, the difference between th- Commission rates and this rate, because the rates had never become legal, operative or effective under the law of this State. And believing that, that I couldn't issue, or couldn't execute any such bond as that; I stood upon my legal rights.
296 That if they did not care about issuing the writ of error, why, I denied their right to issue a writ of error coupled with a condition of that kind; and that they had never made an attempt to put these orders into effect they were not effective then, and I would not issue a bond to make effective certain orders that were not then in force and effect. So they handed me my papers back, and I turned the matter over to Mr. Baker. Mr. Baker was going up to Mackinac Island, and I understood he said that Judge Day was up there. The only thing I could tell about that is what Mr. Baker told me, if the court wants to hear it.

Judge Day refused the writ.

Mr. Clark: I would rather not have you go beyond the refusal of the writ, Mr. McNamara.

Q. One of the reasons why you refused to give a bond, as I understand you, was because of the condition which would do away with the injunction?

A. Exactly.

Mr. Clark: I will explain, Mr. McNamara, that my reason for objecting to your going further, is that you and I have always differed as to what the judge gave as his reasons, and possibly through a different understanding between the gentlemen who listened to it; for that reason I would rather not have you put on the record something that is not in my understanding. I don't question in the slightest degree your view of it.

A. I say frankly all I know about that proceeding, I said to Judge Emerick, is what Fred Baker told me.

Mr. Clark: I am willing to have the record show that it was denied by Judge Day.

Mr. Henry: The purpose of this and the application for
297 the writ of error goes to two points, one the injunction, and the other, the good faith and diligence of the defendant in prosecuting the cases.

Q. After the demurrer in the refund case was overruled, what steps did you take then?

A. I demurred to the declaration in the refund case in Bay City.

Q. They raised the same point?

A. Yes; those demurrers were argued before Judge Collins and Judge Collins subsequently overruled my motion, and I prepared a writ of certiorari to the supreme court of this state and presented it to the supreme court of this state, and they did not care about hearing it. They said, because the whole matter could be brought up on a writ of error.

Q. Do you know of any other proceedings that have been taken or attempted in this case, as showing the diligence on the part of the defendant, or showing what they did do?

A. We have been as diligent as we could. We have been working all the while.

Hearing on Motion for New Trial.

Pursuant to consent of counsel defendant's motion for new trial was heard by Hon. Samuel G. Houghton as judge of said court, on the 29th day of January, 1917, and after arguments had been made for and against the motion the following proceedings were had:

Mr. Henry: I would like to have it appear of record that counsel has fairly presented his objections to our motion, and that the court should further be advised of one or two things which are con-
298 tained in the motion. At the time of the trial of this case the defendant made three motions; one was a motion to dismiss at the conclusion of the proofs; the other was a motion to permit the defendant to submit other and additional evidence; and that motion having been made by Mr. Fred A. Baker of Detroit, was read into the record. The motion to dismiss was not made in a formal way by any paper being filed, but Mr. McNamara made an elaborate opening at the conclusion of plaintiff's proofs, and at the conclusion of his opening he stated: "Upon the grounds contained in my statement or opening I move the court to dismiss." Mr. Baker then proceeded to further argue the motion to dismiss, and concluded his argument with a motion to dismiss that in the event the court did not grant the motion to dismiss that they put in further testimony relative to the condition of the defendant railroad, especially subsequent to the 15th of August, 1910, when the last proofs were taken which controlled the rates.

The other motion made was that the plaintiff elect whether it relied on common law counts in its declaration, or whether they relied on the statutory count.

Now, in Judge Coumans' opinion he denied these motions, and when we were here on the 27th of November, counsel for plaintiff, Judge Coumans and ourselves deemed that a sufficient record of the presentation of the motions, and of the disposition thereof by the court, without having a formal order entered in each of the three motions.

These are three of the grounds for the new trial: That the court should have dismissed the case at the conclusion of the proofs, and in event he did not dismiss the case at the conclusion of the proofs, that we be permitted to present other and further testimony
299 to the court, and that the court require the plaintiff to elect whether he relied upon the common law or statutory counts or upon both.

Now, your honor, in addition *that* that, and as one of our reasons for a new trial, I quoted Judge Coumans as follows:

"Now, it may be some advantage to the defendant in this case to have it appear of record that it would be utterly impossible for the court, with the limited time he can sit here as a court, to take this case and go through it and give satisfactory reasons and the various requests that have been made by the defendant, if he overrules them, and whatever is done has got to be done today, or not later than tomorrow, as the changed conditions here will make that necessary. The court will retire probably the day after tomorrow; I am not advised as to the exact time, but Judge Houghton told me a week ago, and the record can show that he succeeds me here as judge, that he would not qualify until the first of the month. I have been informed since that time that he is to qualify on the 29th of this month, so I don't see how I could, even if inclined to do so, go into the matter any more elabor- than as stated in the findings Mr. Clark has filed here to be adopted, if I adopt them, I think it is to the interest of everybody to close it up now and not be submitted to Judge Houghton or somebody afterwards, because it will cause undoubtedly a lot of time and delay, and it seems to me that the court of last resort in this state will be able to protect the rights of the defendant fully, because you have your requests there covering, as I read it, every phase of the case known to me, and if they are denied you are square on your rights. To get the matter in the condition I think it should be in, I shall sign the findings as prepared by the plaintiff, with the addition of the 43rd and 44th requests, which are refused.

300 Mr. McNamara: As I understand your honor will enter an order denying all our requests. What we object to is the adopting the language of Mr. Clark in explanation of certain requests."

Now, while Mr. McNamara stated the understanding that the court adopted the language of Mr. Clark there was a great deal of other argument to the court, many more reasons advanced than the one suggested by counsel.

"The Court: Well, the court will say that while that is the language of Mr. Clark, I have gone over this and have had that paper before me for several days, and I will adopt that as my own

language in the cause, and the additional findings that Mr. Clark asked for will be filed and allowed.

"Mr. McNamara: Then the other paper that Mr. Clark prepared with reference to our findings, I understand the court adopts that too?

"The Court: Yes, adopts that, and to make your record right we want to add that the 43rd and 44th requests are refused."

I merely read this to the court in connection with this more formal presentation of our motion to show the court that Judge Coumans appreciated the fact that it would be impossible for him to pass upon our findings specially.

I do not think that rule 45 nor the Judicature Act very materially changes the duty of the court in reference to applications for new trials, neither do I think it changes appreciably the duty of counsel in a case tried before a court to present their requests. Rule 45 reads this way: "Either party may present requests to the
301 court before judgment at any time, and if so requested it becomes the duty of the court to pass specially on each of said requests."

Now, in this, our motion for a new trial, we insist that that was not done in this case; it was not done for the first reason that it was a physical impossibility for Judge Coumans to do it. I am willing to accept what counsel has stated here in reference to our amended motion for a new trial as conclusive upon that point, and I shall not urge that further.

The understanding, as I understand it, is that this testimony of Mr. McNamara's may go into the record in the five refund cases here in Bay City, the first being Calendar No. 10211, and the other four cases, the same as though it had been submitted before Judge Coumans at the time the other evidence was submitted.

Further, if I understand counsel right, this court may consider that testimony in connection with the other testimony in passing upon our motion for a new trial.

I ask the court now here to make a written finding of his disposition of this motion. I don't know what your honor's practice has been in that regard.

The Court: It has been the practice here as long as I can remember that if you ask the judge to give his reasons he has always done so, and usually does it whether he is asked or not.

Mr. Henry: Whether your honor could pass on those questions without hearing the case is a matter I would like to have you consider before making the written reasons.

Mr. Clark: I want the record to show that the statements taken down by the official stenographer were at the close of a longer
302 argument in which both counsel had stated their views, especially in regard to granting a new trial, and I don't wish to repeat my argument on the record, but merely wish the record to show that there has been an argument and that your honor had heard the reasons from counsel for both sides as to why this new hearing should or should not be granted.

I also want the record to show as stated by counsel; we do consent that the newly discovered evidence, the testimony of Mr. McNamara as given in Alpena in the trial of the Gilchrist case, and the exhibits referred to by him, may go into this record as a part of the motion for a new trial, and may be considered as though presented to your honor on the making of such a motion, or even if presented to Judge Coumans on the making of the motion for a new trial, so the supreme court may with our consent take into consideration whether this new evidence is of any value or importance in its effect upon the merits of the case. Of course we cannot concede that it came before Judge Coumans on the hearing itself, because it did not, but so far as the supreme court is concerned they may consider it with our consent as bearing upon the decision of the case on its merits.

In respect to the so-called motion to elect, the record should show that after the request or motion was made by defendant to require plaintiffs to elect, etc., I stated, both verbally on the argument, and in my brief, that plaintiffs had no intention of supporting their case by any other evidence than proof of the fact that the rates charged by defendant exceeded the rates fixed by the Railroad Commission and confirmed by the courts, and were therefore illegal. That for this reason no evidence of the unreasonableness or reasonableness of the rates in themselves should be received in behalf of either
303 party.

I further stated that I did not wish to mislead defendant's counsel, and would answer upon the record any question that might be asked in respect to plaintiff's theories and claims, but would not abandon any of the counts of the declaration merely because they might be broad enough to cover some other theory than the theory actually presented upon the hearing. I stated that the special counts of the declaration explained fully the foundation of the common counts.

I make that statement because the statements just referred to are not in the record anywhere, but were presented both to counsel and the court in our briefs, as a means of explaining our theories bearing on the motion to elect.

I think your honor should deny this motion for a new trial.

Mr. Henry: Counsel has gone into another matter, which we will present to the court now here.

On this motion for an election we filed a petition to that motion, and stated that it would be presented to the court; that no journal entries ever appeared in connection with any one of these three motions. I have prepared journal entries, however, and in the abundance of caution, if agreeable to the court, I should like to have all three motions treated as formal motions made and disposed of as they were disposed of by Judge Coumans.

The first motion and the language which I would like to have the court permit us to put in, an order denying the same, is as follows:

A motion having been heretofore made on the part of defendant in this cause that the plaintiffs elect which count in their declara-

tion they rely on for the recovery of a judgment in this
304 case, whether plaintiffs rely on their so-called statutory count or upon their so-called common law count in their declaration for such recovery, after hearing counsel for the respective parties, it is ordered that the said motion be and the same is hereby denied, without costs to either party.

We don't think that anything can be added now to the reasons for it. Counsel of course will present his brief, if the case goes to the Supreme Court, and his reasons there, but if the court please in view of the fact that we made a formal written petition and gave notice of hearing would like the court to permit us to have this either made a journal entry or an order signed by the court, either as nunc pro tunc as of the 27th of November, 1916, or today, as shall please the court and counsel.

In that connection I have prepared orders denying the motion to dismiss and denying the motion to submit further testimony, which I have hereinbefore referred to, and it is in the same language, merely that it is denied in each instance.

I think perhaps if your honor will permit me I will read it.

A motion having been made in this cause by and on behalf of defendant that the court permit defendant to submit further evidence respecting the property of the defendant, its value, its earnings, its expenses, its depreciation, its total income, and other facts during the years ending June 30, 1910, 1911, 1912, 1913, 1914, 1915, down to February 18, 1915, as set forth in such motion which Mr. James McNamara and Mr. Fred A. Baker made at the conclusion of the proofs in this case; after hearing counsel for the respective parties it is ordered that the said motion be and the same is hereby denied without costs to either party.

305 The last motion is the one with reference to the dismissal and we ask the court to permit us to make a formal journal entry or that the court sign an order as follows:

A motion having been heretofore made on the part of defendant at the conclusion of the plaintiff's proofs that all proceedings had and taken therein be dismissed and that judgment be rendered in favor of defendant of no cause of action; after hearing counsel for the respective parties it is ordered that said motion be and the same is hereby denied, without costs.

Mr. Clark: I have no objection whatever to the orders, in fact I think I stated on the record that I would consent to the entry of any formal order that counsel wished to make the record complete.

Mr. Henry: How and when should these orders have been entered?

Mr. Clark: I don't know whether there is such a thing possible as a journal entry nunc pro tunc, the journal is made up every day. These are a mere formality in one sense of the word, they are to make the record complete, and I suppose they should go into the proceedings of today in the ordinary course.

Whatever I stated here on the record is in full explanation of them.

The Court: I should think under the circumstances the Supreme Court would consider them as made when they were, although dated subsequently perhaps.

Mr. Clark: That is why I wanted to make the statement on the record on the motion to elect.

306 The Court: Well, I want to do anything I can to aid counsel in getting this matter squarely before the Supreme Court.

Mr. Henry said something about some things you still have in the motion, you would want the reasons set forth as though it would require some further argument and further study.

Mr. Henry: I don't think that could be done unless you granted the motion for a new trial. I mean by that that I don't think the court could give reasons that perhaps he would give if he heard the testimony.

The Court: Well, it seems to me as the case has been before the court a long time, and been before two judges, it could not profit very much at this time if a new trial were granted, and it would seem as though it had taken a great deal of time and expense to get the case in shape for the Supreme Court, and it having been passed upon largely by two courts, and the present court, knowing nothing of the case only as he has gained a little of it, if there was something perhaps that was omitted, and that seems not to be the case here, it would seem as though it were in as good shape to go to the Supreme Court now as at any time. I think under the circumstances I will deny the motion, and I will take your motion and give it such attention as I can under the circumstances and set forth the reasons for the denial in each instance. Probably if I had more time and knowledge of the case there might be more intelligent reasons for the denial of the specific requests or reasons, but we will endeavor to do the best we can under the circumstances.

307 *Decision on Motion for New Trial.*

(February 26th, 1917.)

This matter came on to be heard on a motion for a new trial in the above entitled cause and the other companion cases.

After considering the reasons given why a new trial *trial* should be granted the court being advised in the matter as fully as could be under the circumstances of the case, which has been pending for some considerable time and at different stages been before two other judges, and having reached the conclusion that the reasons for granting a new trial are not sufficient, the motion is hereby denied for the following reasons:

1. That the judgments were not unauthorized by act No. 300 of the Public Acts of 1909 and amendments thereto.

2. That the court did not err in overruling the motion made in each of said cases to dismiss said causes.

3. The three orders made by the Michigan Railroad Commission referred to in defendant's third reason for granting a new trial were not void and without force.

4. The court did not err in overruling the defendant's motion requiring plaintiff to elect whether they relied upon the act last referred to or the common law.

5. The court did not err in its construction of sections 10, 16, 18, 22, 25 and 26 of Act No. 300 of the Public Acts of 1909.

6. In considering the matters set forth in defendant's sixth reason for the granting of a new trial I am satisfied that the
308 court reached a judicial determination of the matters submitted and referred to in said motion, and that the action of the court in this regard did not constitute an error nor prejudice the rights of defendant.

7. That the court did not err in a fuller compliance with Circuit Court rule 45 as set forth in defendant's seventh reason, as it appears from the record that the matters before it and specified in said seventh reason were judicially determined by it.

8. The court did not err in refusing to comply with the request of defendant's attorneys as pointed out in the eighth reason, since the findings of the court were sufficient for a proper determination of that element of the case.

9. The court did not err in his determination of the matter as pointed out in defendant's ninth reason, since it appears of record that he did pass judicially upon the numerous questions submitted by the defendant's attorneys.

10. As appears by the records in said cause the Circuit Court determined the questions involved, giving it such consideration as he considered sufficient, which resulted in a legal determination by it and against the contention of defendant, the record showing that the then Circuit Judge passed finally on each and all questions submitted for consideration.

11. Misunderstanding of attorneys on a trial is not necessarily a reason for granting a new trial, and in view of the time and labor put upon this case, is not sufficient to warrant the court at
309 this time in granting a new trial. The newly discovered evidence was not so material as to operate as a mistrial or even a miscarriage of justice, and in consequence thereof is not sufficient to warrant this court in granting a new trial.

S. G. HOUGHTON,
Circuit Judge.

Dated February 26, 1917.

(Copy to Mr. Clark and Mr. Henry.)

Exceptions to Denial of Motion for New Trial.

(Filed March 1, 1917.)

1. Defendant in the above entitled cause hereby excepts to the refusal of the Court to grant to defendant a new trial of said cause.

2. Said defendant expressly excepts to the first reason assigned by the court for his denial of defendant's motion for a new trial.

3. Said defendant hereby expressly excepts to the second reason assigned by the court for his denial of defendant's motion for a new trial.

4. Said defendant expressly excepts to the third reason assigned by the court for his denial of defendant's motion for a new trial.

5. Said defendant expressly excepts to the fourth reason assigned by the court for his denial of defendant's motion for a new trial.

6. Said defendant expressly excepts to the fifth reason assigned by the court for his denial of defendant's motion for a new trial.

310 7. Said defendant expressly excepts to the sixth reason assigned by the court for his denial of defendant's motion for a new trial.

8. Said defendant expressly excepts to the seventh reason assigned by the court for his denial of defendant's motion for a new trial.

9. Said defendant expressly excepts to the eighth reason assigned by the court for his denial of defendant's motion for a new trial.

10. Said defendant expressly excepts to the ninth reason assigned by the court for his denial of defendant's motion for a new trial.

11. Said defendant expressly excepts to the tenth reason assigned by the court for his denial of defendant's motion for a new trial.

12. Said defendant expressly excepts to the eleventh reason assigned by the court for his denial of defendant's motion for a new trial.

Dated, February 28th, 1917.

HENRY & HENRY,
Attorneys for Defendant.

To Gillett & Clark, Attorneys for Plaintiff.

311 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

Cal. No. 10211.

FLETCHER PAPER COMPANY, Plaintiff and Cross Appellant,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant and Appellant.

Plaintiff's Assignments of Errors.

The Plaintiff says that in the record and proceedings in the above entitled cause, there is manifest error in this, to-wit—

1. The Court erred in denying plaintiff's motion to double plaintiff's entire damages aggregating $25,738.83.

2. The Court erred in denying plaintiff's motion to double so

much of plaintiff's damages as have accrued since July 22, 1912, viz: $14,921.95.

3. The Court erred in denying plaintiff's motion to double so much of plaintiff's damages as have accrued since March 22, 1913, viz: $10,199.53.

4. The Court erred in denying plaintiff's motion to double so much of plaintiff's damages as consists of the interest accrued on the sums paid by plaintiff in excess of the lawful charges, viz: the sum of $4,392.40.

5. The court erred in denying plaintiff's motion to double so much of plaintiff's damages as have accrued since July 25, 1914, viz:—$288.60.

GILLETT & CLARK,
Attorneys for Plaintiff.

312 STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

Cal. No. 10211.

FLETCHER PAPER COMPANY, Plaintiff,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

Assignments of Error.

Now comes the Detroit & Mackinac Railway Company, defendant, by its attorneys, and alleges -hat in the record and proceedings in the cause above entitled there was and is manifest error in the following particulars:

1.

The court and judge thereof erred in overruling the demurrer made by the defendant to the declaration of the paintiff and in making the order so overruling said demurrer as entered in said case July 7, 1915.
(R. 25-31, 33.)

2.

That Hon. Chester P. Collins, judge of said court, erred in his written opinion overruling such demurrer, such opinion being contained at length in the record.
(R. 25-32.)

3.

That said court and the judge thereof erred in stating that issues and facts upon which such opinion overruling said demurrer was predicated.
(R. 25-32.)

313 4.

That said court and the judge thereof erred in the opinion overruling said demurrer, wherein is stated amongst other things as follows:

"It plainly appears that this statute introduces new elements, circumstances and conditions in the relations between railroad companies and their shipper patrons, and that it gives to the patrons under certain conditions, rights and remedies not given by the common law."

This assignment of error is dependent upon the opinion later expressed by the court relative to the application of the statute and the common law to the issues involved.

(R. 27.)

5.

That the court and the judge thereof erred in such opinion wherein is stated amongst other things:

"It is fundamental and elementary that where a statute gives rights or remedies not theretofore given by the common law, such rights and remedies are to be considered as cumulative and not as abrogating the common law rights and remedies, unless the statute giving those remedies, either by express terms or by clear inference abrogates such common law rights and remedies."

This assignment of error must be considered in connection with the whole opinion.

(R. 27.)

6.

That the court and the judge thereof erred in that part of such opinion which reads as follows:

314 "From an examination of this statute, I fail to find any purpose of the legislature to take away from any shipper any right theretofore enjoyed by him. From such examination I find a well-defined purpose to give a shipper under certain conditions, rights and remedies not theretofore enjoyed by him * * * The fixing of such rate is by an order of the commission and is prima facie lawful and reasonable until found otherwise, pursuant to a provision of Section 26, or modified under Section 24. This rate when settled by a court decision under the provisions of Section 26 becomes an adjudication and final, so that in a controversy thereafter between a shipper and the company, upon the point of the reasonableness or unreasonableness of the rate, the order so settled by the court is an adjudication, and one of the main objects of the bill is to produce this result."

This assignment is to be considered in connection with the opinion in its entirety.

(R. 28.)

7.

That the court and the judge thereof erred in such opinion wherein is stated the following:

"From a consideration of the whole act, it is my opinion that upon the point under consideration, the common law remedy of the shipper to sue for the excessive charges paid and recover the same in an action of assumpsit, is not taken away."
(R. 29.)

8.

The court and the judge thereof erred in such opinion wherein is stated as follows:

"Sections 40, 46 and 47 are referred to by counsel * * * It
315 may be that these provisions do not have the specific effect of reserving said common law right to sue for excessive rate freight payments, but they certainly do not contain either separately or collectively any provision which opposes or tends to abrogate such right, and it appears to me that considering the effect of these three sections separately or together, they tend to show the legislative intention to preserve the common law right.
(R. 29.)

9.

The court and the judge thereof in such opinion erred by stating:

"Referring specifically to the claim that paragraph (*g*) of Section 10 abrogates a common law remedy of the shipper, attention is called to the following elements of the act. Sections 22, 23, 24, 25, 26 and 27 provides machinery for making what might be termed a working program for future services as between a railroad company and a shipper. They providing for a full hearing, and a fixing of the future rates for commodities between given points; they provide a specific method for the review of that order, and its confirmation, modification or disaff-rmance by a court. There is no provision made therein for the fixing of a rate for past excessive charges."

On the other hand Section 10 requires a railroad company to make and file and publish a tariff of rates which shall be in force for a certain time after publication. The rate fixed by this tariff is presumed to be reasonable until it is otherwise made to appear."
(R. 29.)

10.

That the court and the judge thereof erred in such opinion wherein is stated:

316 "As a part of the machinery of Section 10 it is provided by Section 10 (*g*) that notwithstanding the fixing of the rate by the company, and notwithstanding such rate is presumed to be reasonable and fair, and notwithstanding the freight so fixed has been paid, that even then within six months after the delivery of any shipment of freight at destination, any shipper may attack the reasonableness of the rate he has before that recognized, before the commission. This attack is made through a hearing and determination of the commission as to whether the rate before that exacted was irregular or exorbitant, and as to what would have been a reasonable rate, and provides that if the reasonable rate is found to be

less than the exacted rate, the railroad company should be required to refund, and permits a shipper in that case to sue for the excessive exacted amount before that paid by him, and in such suit the order of the railroad commission is treated as prima facie correct, but no railroad company sued under such conditions shall be liable for any penalty or forfeiture, etc."

(R. 30.)

11.

That the court and the judge thereof erred in such opinion wherein is stated:

"In my opinion paragraph (*g*) (Sec. 22) was intended to provide for cases and conditions which it was assumed, and in fact were not provided for by Section 22, and gives a remedy different from that provided by Section 22, and neither modifies, or in any way affects the provisions of Section 22 or the proceedings thereunder, or takes away any common law right of any shipper."

(R. 20.)

317 12.

That the court and the judge thereof erred in such opinion wherein is stated:

"I am of the opinion that the filing of a tariff by defendant was not a condition precedent to a suit for excess freight by the plaintiff, and that the failure of defendant to sooner file a tariff and comply with the order of the railroad commission has no effect whatever on plaintiff's right or remedy under the statute."

(R. 31.)

13.

That the court and the judge thereof erred in the opinion wherein is stated:

"I have carefully considered the point made against plaintiff's claim based on the interstate commerce act and the decisions of the supreme court of the United States construing the same.

"Without going into detail as to the reasons therefor, I am of the opinion that the conditions and circumstances and general purpose of the two acts, so far as this particular question is concerned, are so manifestly different that the United States supreme court decisions are not applicable to our statute. For the foregoing reasons the demurrer is overruled."

(R. 31.)

14.

That the court erred in his opinion, findings and conclusions as set forth in full in such opinion and that the foregoing assignments of error which do not cover the opinion in its entirety are not intended to except such parts of said opinion as are not
318 quoted, but are to be considered in each instance in connection with the whole opinion, error being assigned on the

findings and opinions of the court on the various issues and questions treated and considered in such opinion, both separately and collectively.

R(R. 25-31.)

15.

That the court erred in causing the order of July 7, 1915, to be made and entered in said cause, overruling said demurrer with costs to the plaintiff.

(R. 33.)

16.

That the court erred in overruling and denying the defendant's motion for change of venue in said cause, from the circuit court of Bay county to the circuit court of Alpena county.

(R. 32.)

17.

That the court erred by making an order on the 20th day of May, 1915, as follows:

"The motion of said defendant to dismiss the cause for want of jurisdiction, having come on to be heard, and after due deliberation, it is ordered that the same be and hereby is denied."

And that said court erred in not granting the defendant's motion to dismiss said cause pursuant to the reasons therein contained.

(R. 22.)

18.

That the court erred in making an order on the 20th
319 day of May, 1915, in said court and cause, which said order and decision reads as follows:

"A motion having been heretofore made on the part of the defendant in this cause that change of venue be granted by transferring said cause for trial to the circuit court for the county of Alpena. After hearing counsel for the respective parties, it is ordered that said motion be and the same is hereby denied, and that plaintiff is hereby awarded an attorney fee of ten dollars as costs of said motion to be taxed."

(R. 32.)

19.

That the court erred in not granting to the defendant the motion made in said cause for such change of venue.

(R. 32.)

20.

That the court erred by receiving in evidence on the trial of said cause Exhibit 1-*j* set forth on pages 120 and 121 of Exhibit 1, said Exhibit 1 being the printed record in the so-called rate case. Such Exhibit 1-j being the order of the Michigan Railroad Commission of date October 19, 1909, relative to switching charges between Al-

pena and Broadwell's dam. Objection being made to such Exhibit 1, offered as follows:

"Mr. Henry: As to that we will make objection that it is not based on any legal complaint. That no complaint was ever made according to the terms of the statute, and therefore, the order is absolutely void.

Mr. McNamara: The further objection I think at this time, that these orders cannot be received here for the specific purpose of recovering in these proceedings, for the reason that they have
320 elected their remedy under the common law, and they cannot introduce here the orders of the Railroad Commission for the purpose of recovering, that they did not comply with the Railroad Commission act by applying to the Michigan Railroad Commission for reparation prior to the commencement of this suit; therefore, these orders are incompetent and immaterial in this case that we have now before us.

Mr. Henry: One further objection. They are void because they were never filed with the commission and never posted and published in accordance with law.

The Court: It may be received for the present.

The exhibit was retained as evidence by the court in the case. (R. 79, Ex. R. 34-35.)

21.

The court erred by admitting in evidence Exhibit 1-*k*, being the order of the Railroad Commission of date October 22, 1909, appearing on pages 118 and 119 of the printed record in the Rate Case, relative to a tariff for the transportation of logs in carload lots to the City of Alpena, the same objection having been made thereto as designated in the last assignment of error.
(R. 80-81, Ex. R. 236-238.)

22.

That the court erred in receiving in evidence the order last above referred to, objection having been made thereto as follows:

"Mr. Baker: I object to that order on the ground that there was no complaint to the Michigan Railroad Commission that
321 the rates to Alpena on logs were unjust, unreasonable and excessive, and that there was no hearing on any such allegation before the Railroad Commission, no evidence was introduced to show that the rates to Alpena were unjust, unreasonable and excessive. The complaint in that case related exclusively to the discrimination in favor of shipments as against Alpena, and I insist that to sustain this order and grant the plaintiff "any relief on this order would be a violation of the due process of law, of the 14th amendment and of the same clause in our own State Constitution. I also make the objection that the provision in this order for a fifty cent refund was an improper rebate and discrimination in favor of the Fletcher Paper Company and is absolutely void, in

and of itself a violation of the Michigan act. Our position in regard to that is that all shippers living in Alpena are entitled to the same rate, regardless of what they do with their products.

The Court: It may be received for the present."

The exhibit was retained in evidence by the court.

(R. 81, Ex. R. 36-38.)

23.

That the court erred in receiving and retaining in evidence Exhibit 1-L, being the order of the Michigan Railroad Commission, known as supplemental order of November 3, 1909, set forth on pages 121 and 123 of the printed record in the Rate Case. All objections heretofore made to the two preceding orders were made to receiving this exhibit in evidence; it being asserted and practically conceded that no hearing was had on the supplemental order, the same having been made on the Commission's own initiative.

(R. 82-84, Ex. R. 38-40.)

322 24.

That the court erred in receiving in evidence Exhibit 1-*x* being an order of the Michigan Railroad Commission, made November 15, 1910, set forth on pages 769 and 770 of the printed record in the Rate Case. It being understood that the objections made to the orders hereinbefore referred to should apply to the admission of this exhibit.

25.

That the court erred by his decision made on the 13th day of November, 1916, wherein he overruled and denied the motion made by and on behalf of the defendant to dismiss the plaintiff's action and direct a verdict in its behalf, as stated and set forth at length by Mr. McNamara at the conclusion of his statement of the defense, said motion to dismiss having been made at the time of the trial of the cause; the decision of the court having been reserved for consideration, and subsequently incorporated in his opinion of the date last named. Said motion and the reasons therefor being contained on pages 151 to 199 of this record. The opinion and decision of said motion being con*a*tined on pages 206 -o 212 of this record.

(R. *R*. 151-202.)

26.

That the court erred in his opinion of date November 13, 1916 wherein he denied the motion made by Mr. Baker by and on behalf of the defendant, to dismiss the action of the plaintiff and direct a verdict in favor of the defendant. Said motion having been made on the trial of said cause, and the reasons stated therefor,
323 being contained on page 198 to page 199 inclusive of this record. The court having reserved its decision as to said

motion, deciding the same as stated in the preceding assignment of error.
(R. 206-212.)

27.

That the court erred in deciding and finding that the rates fixed by the orders of October 22 and November 3, 1909, (Exhibits 1-K and 1-L) were in force before the judicial controversy was terminated by the granting of a writ of maidamus to the Supreme Court of Michigan, July 25, 1914, and because such decision was in violation of the due process of law and the equal protection of law clauses of the 14th amendment of the Constitution of the United States.
(R. 206-212.)

28.

That the court erred by its decision of November 13, 1916 wherein it overruled and denied the motion made on the trial of this cause by Mr. Baker, to submit further evidence relative to the property of the defendant railway company and its value, its earnings and conditions for specific years, and other things as set forth in such motion so made on said trial and contained on pages 199 to 203 inclusive of this record; such motion said court having taken under advisement and decided as stated herein on November 13, 1916.
(R. 206-212.)

29.

That the court erred in its findings of facts and conclu-
324 sions of law as set forth at length in its opinion made and filed November 13, 1916, prior to the rendition of judgment in this cause.
(R. 206-212.)

30.

The court erred in its findings of fact of date November 13, 1916 in not indicating therein that the orders of the Railroad Commission involved in this suit of dates October 19, October 22 and November 3, 1909, were never posted and published as required by law, and were never filed with the Commission in pursuance of the statute, and that no complaints or petitions were ever made to the Railroad Commission authorizing the making of such orders, or that said orders did not contain the judgment of the Railroad Commission, and that the order known as Supplemental Order of date November 3, 1909, was made without any hearing and on the initiative of the Railroad Commission and was void and of no force and effect.
(R. 209.)

31.

That the Court erred in its conclusions of law as contained in the opinion of November 13, 1916, wherein is stated:

"The right to recover excessive or illegal freight rates by an action of assumpsit existed at common law and has not been taken away by statute. The statute (Act 300 of 1909) gives additional rights and remedies, but creates no new form of action."
(R. 209.)

325 32.

That the court erred in its conclusions of law contained in said opinion wherein is stated:
"The new provisions for the protection of shippers are principally found in sections 10 and 22 of the statute. These sections apply to different circumstances. Proceedings under one or the other of these sections may be selected to fit the circumstances. The result in each case is an order of the commission, and I find nothing in the statute to indicate that an order made under Section 22 is any less effective than an order made under Section 10. I therefore hold that plaintiff was not required to take any proceedings under Section 10 before commencing its action."
(R. 209.)

33.

That the court erred in its conclusions of law wherein in such opinion is stated:
"If the orders of the Railroad Commission stood alone, it might be open to the defendant to question their validity in this case. It is not necessary to decide this question, as the confirmation of the orders by the state and federal courts in the decisions cited, above, make them conclusive in this case. The statute provides that the orders of the Commission shall be in force until set aside by an action brought under Section 26 of the act, or rescinded by the commission. Defendant has exhausted its remedies under Section 26 and these orders must therefore, be given effect until further action by the commission itself. I, therefore, sustain the objection to the proofs offered by defendant. Defendant may have the benefit of an exception to this ruling and by its offer and exception will be
326 protected on appeal."
(R. 210.)

34.

That the court erred in its conclusions of law in such opinion wherein is stated:
"The commission rates became the law of the state twenty days after service of the commission's orders. The order reducing the switching charges to Fletcher's Dam, therefore, took effect on November 24, 1909, and the long rate orders took effect November 26, 1909. Defendant had the right to attack these orders in the courts, but was charged with knowledge that if its attack did not succeed the orders would be considered as effective from the above dates. These dates should, therefore, be used as the dates from which to

compute plaintiff's damages. This conclusion is not changed by the fact of defendant's delay in posting and filing its new tariff, or by the pendency of litigation during this period of delay, nor by the stipulation signed by the attorney General and relied upon by defendant.

For the above reasons defendant's motion to dismiss is denied."
(R. 210.)

35.

That the court erred in its conclusions of law wherein is stated:
"In order to enjoy the fifty cent differential plaintiff is not required to prove the reshipment by rail of the manufactured product from exactly the same logs which were shipped in by rail. The amount and nature of the merchandise reshipped are the important features. In the case of a sawmill, a thousand feet of
327 lumber should be considered as the manufactured product of a thousand feet of logs. In the case of other industries, the words "manufactured product" should be construed in their ordinary sense as meaning such merchandise in nature and quantity as under ordinary circumstances will reach the market, as a result of the manufacturing processes through which the logs go. Sawdust, slabs and other waste and incidental by-products may be properly ignored."
(R. 211.)

36.

That the court erred in its second finding of facts stated therein as follows:
"Plaintiff during the period for which damages are allowed reshipped over the line of the defendant railroad company, manufactured product which exceeded the amount manufactured from the logs shipped in by rail, and covered by the particulars of plaintiff's claim. For the purposes of this finding I adopt the schedules annexed to the deposition of Henry E. Fletcher with the same force as if they were set out at length in this finding."
In this connection defendant alleges error in the schedule of Henry E. Fletcher referred to by the court in such finding of facts and makes such schedule a part of this assignment.
(R. 212).

37.

That the court erred in its third finding of facts wherein damages are to be awarded plaintiff in the sum of $25,738.83 with interest at five per cent from November 13, 1916.

Assignments of Error in connection with the requests
328 made on behalf of defendant for findings of fact and conclusions of law, and in connection with the court's proceedings and doings with reference thereto.
(R. 212.)

38.

That the court erred in not complying with Circuit Court Rule 45 which reads as follows:

"When cases are tried by the court without a jury either party may, if he sees fit, at any time before judgment, present such points of law as may be deemed material, in the same manner in which such points are presented upon requests to charge in jury trials, and the court in it- findings shall pass specially on all such points as in charging a jury, as near as may be."

Also that the court erred in not complying with Section 14 of Chapter 18 of the Judicature Act which provides as follows:

"In giving a decision in actions at law, the court shall specify in writing the facts found and the conclusions of law therein, upon the request of either party."

In pursuance of the opinion of the court made on the 13th day of November, 1916, prior to the rendition of judgment, and in pursuance of the rule and statute above quoted, the defendant presented to the court before judgment forty-four separate and distinct requests for findings of fact and conclusions of law, and requested said court and the judge thereof to pass specially on each point and question contained in such forty-four requests.

That said court did not pass specially upon such requests, but instead thereof accepted the language of counsel for plaintiff
329 as set forth in a paper entitled "Rulings on Defendant's Requests to modify and add to the opinion, findings of fact and conclusions of law made herein."

Error is assigned now here on the failure of the court so to pass specially upon such points and questions, and upon the court's adoption of the language of plaintiff's counsel in the proceedings taken in connection with such requests of defendant.

(R. 215, 232, 246, 250.)

39.

That the court erred in not passing specially upon the points and questions raised by defendant's first request, which request relates to the validity of the petitions and complaints upon which the orders made by the Michigan Railroad Commission were based as declared upon by plaintiff, and in adopting plaintiff's counsel's disposition of such request by the following language:

"The first request made by defendant is refused."

(R. 246.)

40.

That the court erred in not passing specially in writing upon defendant's second request which relates to the validity of the orders of the Railroad Commission set forth in plaintiff's Declaration, and in adopting the language of counsel for plaintiff in disposing of said request as follows:

"The second request is refused."

(R. 246.)

330

41.

That the court erred in not passing specially in writing upon the defendant's third request, which relates to the necessity of filing, posting and publishing the tariff of rates named in such orders, and by adopting the language of counsel for plaintiff disposing of such request as follows:

"The third request is refused:

(R. 246.)

42.

That the court erred in not passing specially in writing upon the points and questions contained in defendant's fourth request which relates to the restraining order made by Judge Mandell, and the stipulation made between Attorney General John E. Bird on behalf of the Commission, and James McNamara on behalf of the defendant, and relates to the date when said orders would become effective by virtue of such order and stipulation and in adopting the language of plaintiff's counsel in disposing of said request as follows:

"The fourth request is refused."

(R. 246.)

43.

That the court erred in refusing to pass specially upon the points and questions raised by defendant's fifth request which relates to the motion made by defendant to dismiss the plaintiff's suit at the conclusion of plaintiff's proofs, and in adopting the language of plaintiff's counsel in disposing of such request as follows:

"The fifth request is refused."

(R. 246.)

331

44.

That the court erred in not passing specially in writing upon the points and questions raised by defendant's sixth request which relates to the institution of proceedings before compliance with subsection (*f*) of Section 10, Act 300 of the Public Acts of 1909, and in adopting the language of plaintiff's counsel in disposing of such request as follows:

"The sixth request is refused."

(R. 246.)

45.

That the court erred in not passing specially in writing upon the points and questions contained in defendant's seventh request relative to conditions precedent to the commencement of this suit, and the procedure to collect the claims made by the plaintiff's declaration, and in adopting the language of plaintiff's counsel in disposing of such request in the following manner:

"The seventh request is refused."

(R. 246.)

46.

That the court erred in not passing specially in writing upon the points and questions contained in defendant's eighth request relative to the motion made by and on the part of the defendant to submit proofs relative to the issues framed and made between the parties; and in adopting the language of plaintiff's counsel in disposing of such request, therein sustaining the objection made by plaintiff to the submission of proofs indicated in such motion.
(R. 246-247.)

332

47.

That the court erred in not passing specially upon the points and questions contained in defendant's ninth request and in denying the same, such request relating to the determination of the amount due before commencement of suit and permitting defendant to refund or pay to plaintiff any such amount so found due; and in adopting the language of plaintiff's counsel in disposing of such request as follows:
"The ninth request is refused."
(R. 247.)

48.

That the court erred in refusing defendant's tenth request, and in not passing specially in writing on the points and questions therein contained, such request relating to the non-compliance on the part of the plaintiff with the mandatory and other provisions of section 10 of the act hereinbefore referred to; and in adopting the language of plaintiff's counsel in disposing of such request as follows:
"The tenth request is refused."
(R. 247.)

49.

The court erred in denying defendant's 11th request and in not passing specially upon the points and questions therein contained, such request relating to the failure to schedule the tariff of rates and the switching charges, and the failure to post and publish the same pursuant to the statute; and by adopting the language of plaintiff's counsel in disposing of the same as follows:
"The 11th request is refused."
(R. 247.)

333

50.

That the court erred in denying defendant's 12th request relative to requiring plaintiff to elect whether it demanded recovery by virtue of Act 300 of the Public Acts of 1909 or whether it claimed the right to recover by common law; and adopting the language

of plaintiff's counsel in disposing of the same in the manner following:

"In respect to the 12th request the special counts of plaintiff's declarations show to what extent plaintiffs rely upon the statute and to what extent upon the common law. The nature of the proofs submitted by plaintiffs shows that the claims made by plaintiffs upon this hearing are based upon these special counts, and there has been no indication of any other or inconsistent claims based upon the common counts or otherwise. Plaintiffs are not taking any inconsistent positions and I see no ground for requiring any election. The 12th request is, therefore, refused."

(R. 247.)

51.

That the court erred in denying defendant's 13th request relating to the right of plaintiff to recover under both the common law and the statute, and in not passing specially upon the points and questions therein contained; and in adopting the language of plaintiff's counsel in disposing of said request as follows:

"The 13th request is refused for the same reason."

(Referring to the 12th request.)

(R. 247.)

52.

That the court erred in refusing to grant defendant's
334 14th request relative to the construction of paragraph 3 of the court's conclusions of law made November 13, 1916, and in failing to indicate what circumstances would authorize proceedings pursuant to Section 10 of said Act 300, and what circumstances would authorize proceedings and recovery under Section 22 of said act; and in not determining that this suit would be instituted by the plaintiff regardless of the circumstances and evidence submitted without invoking the provisions of Sections 10 of said act; and in not passing specially upon the points and questions contained in said request; and in adopting the language of plaintiff's counsel in disposing of such request as follows:

"The circumstances which will authorize proceedings pursuant to Section 10, Act 300 are the circumstances mentioned in that section. The same is true with respect to Section 22 of the Act. Except as herein stated the 14th request is refused."

(R. 247.)

53.

That the court erred in refusing the defendant's 15th request relative to the submission of proofs covering the time for which recovery is demanded, in event the court shall determine that plaintiff is entitled to recovery in whole or in part; and in not passing specially upon the points and questions contained in said request; and in adopting the language the plaintiff's counsel in disposing of such request as follows:

"The 15th request is refused for the reasons stated with respect to the 8th request."
(R. 247.)

335 54.

That the court erred in refusing defendant's 16th request to submit evidence on the issues in this suit, in any event from and after August 15, 1910, that being the date when the last evidence was taken upon which such orders declared upon were based; and in not passing specially upon the points and questions in such request; and in adopting the language of plaintiff's counsel in disposing of such request as follows:
"The 16th request is refused for the reasons stated with respect to the 8th request."
(R. 247.)

55.

That the court erred in refusing defendant's 17th request to find that the order made by the Railroad Commission relative to the switching charge to and from the City of Alpena and the Fletcher Dam should be a commodity tariff rate and not a switching rate; and in not passing specially upon the points and questions in such request; and in adopting the language of plaintiff's counsel in disposing thereof as follows:
"The 17th request is refused."
(R. 247.)

56.

That the court erred in refusing defendant's 18th request to deny plaintiffs the right to recover because the Wayne Circuit Judge in the so-called Rate Case peremptorily declined to hear defendant's motion for a rehearing; and in not passing specially on the points and questions in such request; and in adopting the language of plaintiff's counsel in disposing thereof as follows:
336 "The 18th request is refused."
(R. 247.)

57.

That the court erred in refusing defendant's 19th request to find and determine that in event plaintiffs invoke the common law remedy in support of a judgment, it would operate as a repeal of the statute to the extent of such invocation; and in not passing specially on the points and questions in said request; and in adopting the language of plaintiff's counsel in disposing of the same as follows:
"The 19th request is refused."
(R. 247.)

58.

That if this court shall determine that the language used by the trial judge with reference to defendant's 20th request, in effect per-

mits this court to review all questions raised by such demurrer on this appeal, no assignment of error is alleged in connection therewith. If, however, the language of the trial court leaves any questions involved in such demurrer in a condition which may be treated by this court as settled or decided, by overruling the demurrer, in that event and to that extent defendant alleges that the court erred in not granting defendant's 20th request as submited; and in not passing more definitely and specifically upon the points and questions therein contained.

(R. 247-248.)

59.

That the court erred in refusing defendant's 21st request to find and determine that any rebate of fifty cents per thousand feet
337 of the manufactured product shipped out, such rebates could only be accorded the plaintiff by the out-shipment of the actual products manufactured from the same forest products by the defendant; and by not passing specially upon the points and questions in such request; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 21st request is refused."

(R. 248.)

60.

That the court erred in refusing defendant's 22nd request to find that any parts of forest products shipped to the plaintiffs which were not actually shipped out, should be credited to the defendant; and in failing to pass specially on the points and questions in such request; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 22nd request is refused, and in respect to the subject of such request, I find that the hearts of veneer logs are to be treated like slabs and sawdust as incidental by-products which can be ignored in considering the reshipment of the manufactured product."

(R. 248.)

61.

That the court erred in refusing defendant's 23rd request that any judgment for plaintiff would be contrary to the great weight and preponderance of evidence; and not passing specially upon the points and questions therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

338 "The 23rd request is refused."
(R.248.)

62.

That the court erred in refusing defendant's 24th request to charge that in no event could the plaintiff recover for any amounts collected by the defendant at a date prior to six months before the commencement of suit pursuant to sub-section (*g*) of said section 10; and in

not passing specially on the points and questions therein; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 24th request is refused."

(R. 248.)

63.

That the court erred in refusing defendant's 25th request to the effect that the three several commission orders declared upon expressly provide for the posting and publishing of rates, and that said orders were not posted and published until April 18, 1915, and the provisions of said order respecting such posting and publishing were mandatory; and by not passing specially upon the points and questions therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 25th request is refused."

(R. 248.)

64.

That the court erred in refusing defendant's 26th request to find that no amount could be recovered by reason of sections 16 and 18 of said act, and that by exacting amounts from the plaintiff other
339 or different than the posted and published tariff would be a violation of the statute; and by not passing specially upon the points and questions therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 26th request is refused."

(R. 248.)

65.

That the Court erred in refusing defendant's 27th request to determine and find that defendant by collecting a different rate than the posted and published tariff would thereby destroy the uniformity of rates provided by statute, and such proceeding would be illegal; and by not passing specially upon the points and questions raised therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 27th request is refused."

(R. 248.)

66.

That the court erred in refusing defendant's 28th request to find and determine that section 10 of said act was designed to provide reparation to the shipper and that it relates exclusively to rates exacted prior to the commencement of any suit for the recovery of asserted excessive or illegal rates, and that plaintiffs had not complied therewith; and in not passing specially upon the points raised therein; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 28th request is refused."

(R. 248.)

340 67.

That the court erred in refusing defendant's 29th request to find that section 22 provided no remedy for the recovery of such rates collected by defendant, and that section 10 did provide such remedy, such section 10 having been ignored in plaintiff's proceedings in this cause; and in not passing specially upon the points and questions raised therein; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 29th request is refused."

(R. 248.)

68.

The court erred in not finding and deciding as requested by defendant's 30th request; and in not passing specially upon the points and questions therein; and in holding and deciding as requested by plaintiff's counsel in the following language:

"In regard to the 30th request it is impossible to generalize accurately in a few lines in respect to the application of section 22 of the statute. The section is plainly expressed and no generalization in regard to its application is necessary for a determination of this case. The 30th request is, therefore, refused."

(R. 248.)

69.

That the court erred in not finding that on the 24th of November, 1909, an injunction was issued by Hon. George S. Hosmer, circuit judge of Wayne county, restraining the Michigan Railroad Commission from putting into operation or making effective the orders declared upon; and by using the language of plaintiff's coun-
341 sel in disposing of defendant's 32nd request to charge as follows:

"I find that on November 24, 1909, Thomas F. Farrell, register of the circuit court for the county of Wayne, in chancery, signed as such register a document of which a copy appears on page 152 of the printed record in the rate case, which copy may be used as if set forth in this finding."

(R. 249.)

70.

That the court erred in its finding as to defendant's 33rd request by stating the facts relative to the stipulation therein referred to, but wi-hout making reference to the injunction and the order to show cause, and the hearing thereon, and without finding and passing specially upon the other points and questions in such request contained; and by adopting the language of plaintiff's counsel in disposing thereof.

(R. 249.)

71.

That the court erred in not passing specially upon all points and questions raised by the defendant's 34th request; and in not finding

that the circuit judge of Wayne county peremptorily refused to hear defendant's counsel upon their motion made and presented to that court for a rehearing; and in adopting the language of plaintiff's counsel in disposing of such request.

(R. 249.)

72.

That the court erred in refusing defendant's 35th request; and in not passing specially upon the points and questions therein;
342 and in adopting the language of plaintiff's counsel in reference thereto as follows:

"The 35th request is denied."

(R. 249.)

73.

That the court erred in refusing defendant's 36th request with reference to the rendition of judgment in favor of the plaintiff as indicated by the court's opinion of November 13, 1916, upon the evidence submitted and without permitting defendant to supplement such evidence in support of the orders declared upon; and in adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 36th request is denied."

(R. 249.)

74.

That the court erred in refusing defendant's 38th request with reference to the force and effect to be given to the stipulations in connection with the bill of particulars in this cause; and in not passing specially upon all points and questions raised therein; and in adopting the language of plaintiff's counsel in disposing thereof.

(R. 250.)

75.

That the court erred in refusing defendant's 40th request; and in not passing specially upon the points and questions therein contained, to the effect that the provisions of said Act 300 did not make the orders effective until the provisions applicable to the legality of such orders were complied with, and with reference to the con-
343 struction of the statute with reference to the twenty day period and the provisions relative to the filing of schedules and posting and publishing the rates provided for by the statute; and in adopting the language of plaintiff's counsel in disposing of such request as follows:

"The 40th request is refused."

(R. 250.)

76.

That the court erred in refusing defendant's 41st request to find that the rebate provisions in the tariffs of defendant railway com-

pany and in the orders of the railroad commission violated the act referred to; and in not passing specially upon the points and questions therein contained; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 41st request is refused."

(R. 250.)

77.

That the court erred in refusing defendant's 42nd request to find that the common law remedies for irregular or exorbitant charges by railroad companies for the carriage of freight have been superceded and abolished by such statute, Act 300 aforesaid; and by not passing specially upon the points and questions therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 42nd request is refused."

(R. 250.)

78.

That the court erred in refusing defendant's 43rd request
344 as to the construction of section 22 of said Act 300, with reference to the rates and charges; and by not passing specially upon all points and questions therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 43rd request is refused."

(R. 250.)

79.

That the court erred in refusing defendant's 44th request relative to litigation subsequent, and in reference to the orders declared upon, and the prevailing conditions incident thereto; and by not passing specially upon the points and questions involved therein; and by adopting the language of plaintiff's counsel in disposing thereof as follows:

"The 44th request is refused."

(R. 250).

80.

That the court erred in signing and filing in this cause on the 27th day of November, 1916, the additional findings of fact prepared by plaintiff's counsel consisting of 36 numbered findings and paragraphs; and by adopting the language of plaintiff's counsel in making such findings.

(R. 234-239.)

81.

That the court erred in the 31st numbered additional finding of fact wherein is stated the following:

"The facts and figures set forth in plaintiff's bill of par-
345 ticulars are true and correct and may be treated as if set forth in this finding."

And in adopting the language of plaintiff's counsel in the preparation and making of such finding.
(R. 238.)

82.

That the court erred in making the 32nd additional finding of fact wherein is stated as follows:
"The facts and figures set forth in the schedule annexed to the deposition of Henry E. Fletcher are true and correct, and may be treated as if set forth in this finding."
And in adopting the language in the preparation of such finding as prepared and presented by counsel for plaintiff.
(R. 238-239.)

83.

That the court erred in making its 33rd additional finding of fact as follows:
"In the manufacture of paper by plaintiff the forest products received over the line of defendant's railroad are necessarily mingled and confused with forest products received from other sources, so that it is impossible to identify any portion of the finished product as manufactured from any specific log or group of logs received."
(R. 239.)

84.

That the court erred in making its 34th additional finding of fact wherein is stated as follows:
"The facts and figures set forth in the schedules an-
346 nexed to the deposition of Warren Penniman as Exhibits 34 and 35 are true and correct, and may be treated as if set forth in this finding."
(R. 239.)

85.

That the court erred in making its 35th additional finding of facts wherein is stated as follows:
"When the plaintiff paid to the defendant the various sums for which recovery is sought herein, defendant's representative receiving such payments stamped upon the receipts (called expense bills) an indorsement substantially as follows: 'Paid under protest,' or 'Paid under protest on account of excessive charges. Fletcher Paper Company, by W. F. Victor, Treas.' "
(R. 239.)

86.

That the court erred in denying defendant's application for a new trial pursuant to the motion made and the reasons therein set forth of date January 22, 1917, and in the reasons filed for such decision in denying motion for new trial on the 27th day of February, 1917.
(R. 265-303.)

87.

That the court erred in denying defendant's motion for new trial wherein the court in his reasons therefor amongst other things held that the judgments were not unauthorized; that the court did not err in overruling defendant's motion to dismiss; that the orders of the Railroad Commission were not void and without force; that the court rightfully overruled defendant's motion as to the election of counts; that the court correctly construed the statutes
347 involved in this cause, being various sections of Act No. 33 of the Public Acts of 1909.
(R. 307.)

88.

That the court erred in the sixth paragraph of such decision denying said new trial wherein is stated the following:
"In considering the matters set forth in defendant's sixth reason for the granting of a new trial, I am satisfied that the court reached a judicial determination of the matters submitted and referred to in said motion, and the action of the court in this regard did not constitute an error nor prejudice the rights of defendant."
(R. 307-308.)

89.

That the court erred in overruling said motion for new trial and in holding in his reasons therefor that no error was made by failing to comply more fully with circuit court Rule 45 as alleged on behalf of defendant.
(R. 308.)

90.

That the court erred in overruling defendant's motion for new trial in holding that in determining the requests of defendant the court pass specially or judicially upon the various requests and questions submitted the court.
(R. 308.)

91.

That the court erred in overruling defendant's motion for new trial and in so doing, determining that the circuit judge
348 with whom the requests were filed on the 27th day of November, 1916, sufficiently considered the same, notwithstanding such requests were peremptorily denied on the same day and for the reasons prepared by plaintiff's counsel subsequent to submitting the same to the court.
(R. 308.)

92.

That the court erred in the 11th paragraph of his reasons for denying said new trial on the ground of newly discovered evidence,

asserting that such evidence was not so material as to operate as a mistrial, or even a miscarriage of justice. However, in making this assignment of error, in consideration of the concession of plaintiff's counsel that this court might consider such testimony on the hearing of this cause on its merits, to the extent that such testimony is set forth in such motion for new trial, and to the extent that such testimony so set forth in such motion shall be considered by this court in determining the issues involved in this case upon its merits, no error is assigned in connection therewith.
(R. 308-309.)

93.

The defendant now here claims the benefit in these assignments of error of all exceptions filed to the denial of its motion for new trial of date February 28, 1917, filed in said cause March 1, 1917, each of such exceptions being now here alleged as a part and portion of defendant's assignments of error.
(R. 310.)

94.

349 That the court erred in deciding that the plaintiff was entitled to judgment, and in entering a judgment for plaintiff as appears of record in this cause.
(R. 245-251.)

95.

That the court erred in deciding and ruling that the common law action of assumpsit for excessive or illegal freight charges have not been taken away by statute.
(R. 231, 244, 247, 250.)

96.

That the court erred in deciding and ruling that Act No. 300 of the Public Acts of 1909 as amended, gives additional rights and remedies, but creates no new form of action.
(R. 209.)

97.

That the court erred in deciding and ruling that the rates named in the orders of the Michigan Railroad Commission declared upon in this cause, became the law controlling the parties hereto twenty days after the service of such orders, viz: November 24, 1909, and November 26, 1909.
(R. 210.)

98.

That the court erred in deciding and ruling that the defendant's delay in posting and filing its schedule of tariff rates, or by the pending of the litigation, or the stipulation of Attorney General, did not change the conclusions that the orders of the commission

were the law of the state and controlling the parties hereto twenty days after the service of such orders.
(R. 210.)

350 99.

That the court erred in deciding that the plaintiff can recover the differential rebate of fifty cents per thousand feet as an excessive charge, and without proving the reshipment by rail of the manufactured product from exactly the same logs which were shipped in by rail.
(R. 210-211.)

100.

That the court erred in deciding and ruling that the orders declared upon are conclusive proof that the rates collected by the defendant were excessive and of the amount of the excess.
(R. 206-212.)

101.

That the court erred in deciding and ruling that the facts found by it supported its conclusions of law.
(R. 206-212.)

Wherefore, this defendant and appellant prays that the judgment in favor of the plaintiff may be reversed and held for naught; etc.
Dated, April 2nd, 1917.

JAMES McNAMARA,
HENRY & HENRY,
Attorneys for Detroit & Mackinac Ry. Co.,
Appellant.

351 Inasmuch as the exceptions taken as aforesaid, do not all appear in the record of said cause, said court, upon the application of counsel for both parties, has settled this bill of exceptions which contains all of the testimony taken, evidence submitted and proceedings had on said trial, and the court does hereby certify that in so far as the testimony is set out by questions and answers, it is necessary for the full understanding of the questions raised.
It is further certified that the said bill of exceptions when signed, was accompanied by the assignments of error on behalf of both parties; that of defendants being numbered 1 to 101 inclusive, and that of plaintiff 1 to 5 inclusive.

S. G. HOUGHTON,
Circuit Judge.

Signed and dated this 16th day of April, 1917.

352 FLETCHER PAPER CO., ISLAND MILL LUMBER CO., RICHARDSON LUMBER CO., CHURCHILL LUMBER CO., MICHIGAN VENEER CO., Plaintiffs and Cross-Appellants,

VS.

DETROIT & MACKINAC RAILWAY CO., Defendant and Appellant.

Record of Exhibits.

353 INDEX TO EXHIBITS

Indicating Pages Main Record and Exhibit Record.

This Index indicates the number and nature of the exhibit, where found in the Main Record, where found in this Record of Exhibits, and if in the printed record in the Rate Case, the page where set forth.

No. of Ex.	Name of Exhibits. (See index in main record for substance.)	Page main record.	How exhibits set forth.	Page exhibit record.
Plff's 1	Printed Record Rate Case	73	Synopsis of Contents	363 to 365
1-A	Tariff M. R. C. 205	74	In full (p. 129 Record Rate Case)	365 to 366
1-B	Tariff M. R. C. 208	74-75	In full (p. 49 and 144 Rec. Rate Case)	366 to 367
1-C	Complaint of Fletcher Paper Co. Feb. 23, 1909 (D-180)	75	In full (p. 1 Rec. Rate Case)	367 to 371
1-D	Answer of D. & M. Ry. Co. to Ex. 1-C	76	In full (p. 4 Rec. Rate Case)	372 to 378
354				
1-E	Local Freight Tariff Mar. 3, 1909	76	Synopsis (p. 673 Rec. Rate Case)	378
1-F	Complaint of Fletcher Paper Co. Mar. 11, 1909 (D-179)	77	In full (p. 9 Rec. Rate Case)	378 to 381
1-G	Answer of D. & M. Ry. Co. to Ex. 1-F	77	In full (p. 11 Rec. Rate Case)	381 to 389
1-H	Complaint of F. W. Gilchrist et al., Apr. 19, 1909	78	In full (p. 18 Rec. Rate Case)	389 to 392
1-I	Answer of D. & M. Ry. Co. to Ex. 1-H	78	In full (p. 21 Rec. Rate Case)	394 to 395
1-J	Order of M. R. C., Oct. 19, 1909	79	In full (p. 120 Rec. Rate Case)	395 to 396

No. of Ex.	Name of Exhibits. (See index in main record for substance.)	Page main record.	How exhibits set forth.	Page exhibit record.
1-K	Order of Mich. R. R. Com. Oct. 22, 1909	80	In full (p. 118 Rec. Rate Case)	397 to 399
355				
1-L	Supplemental Order M. R. C., Nov. 3, 1909	82	In full (p. 121 Rec. Rate Case)	399 to 401
1-M	Proof of Service	83	Synopsis	401
1-N	Complaint of D. & M. Ry.	83	Summary (p. 124 Rec. Rate Case)	401 to 406
1-O	Order to Show Cause	85	In full (p. 123 Rec. Rate Case)	406 to 407
Deft's Ex. 1	Order to Show Cause	272	Rec. Rate Case (p. 123)	406 to 407
Ex. 1-A	Proof of Service	275	In full (p. 151 Rec. Rate Case)	407 to 408
Deft's Ex. 2	Restraining Order	272	In original files	408 to 409
Deft's Ex. 3	Injunction	275	In full (p. 152 Rec. Rate Case)	409 to 412
356				
Deft's Ex. 4	M. R. C. 199 effective Jan. 15, 1909. M. R. C. 237	287		
Deft's Ex. 5	Decree Wayne Ct. with endorsements	289-291		
Plff's Ex. 1-P	Stipulation of Dec. 2, 1909	85	In full (p. 153 Rec. Rate Case)	412
1-Q	Petition of Fletcher Paper Co. to intervene, Jan. 20, 1909	86	Synopsis (p. 153 Rec. Rate Case)	412
1-R	Petition of F. W. Gilchrist et al., to intervene, Jan. 20, 1909	86	Synopsis, (p. 156 Record Rate Case)	412 to 413
1-S	Order grant petitions 1-Q and 1-R	86	Synopsis, (p. 158 Record Rate Case)	413
1-T	Answer of Mich. R. R. Com. to Complaint	86	Synopsis, (p. 159 Record Rate Case)	413
357				
1-U	Answer of Fletcher Paper Co.	87	Synopsis, (p. 170 Record Rate Case)	413
1-V	Answer of F. W. Gilchrist et al.	87	Synopsis, (p. 187 Record Rate Case)	413
1-W	Certificate of Circuit Judge	87	Synopsis, (p. 768 Record Rate Case)	414
1-X	Opinion of M. R. C. Nov. 15, 1909	87	In full (p. 769 Record Rate Case)	414 to 416

No. of Ex.	Name of Exhibits. (See index in main record for substance.)	Page main record.	How exhibits set forth.	Page exhibit record.
1-Y	Opinion of Circuit Judge	88	In full (p. 771 Record Rate Case)	416 to 436
1-Z	Decree of Wayne Circuit Court	89	Synopsis (p. 791 Record Rate Case)	436
1-AA	Motion for Rehearing and Proceedings thereon.	90	In full (p. 785 Record Rate Case)	437 to 442
2	Printed arguments for Complainants	74	Synopsis	442
358				
3	Brief of Jas. McNamara for Complainant	74	Synopsis	442 to 443
4	Brief of Fred A. Baker for Intervening Complainants	74	Synopsis	443
5	Brief of Franz C. Kuhn for M. R. C.	74	Synopsis	443 to 444
6	Brief of Gillett & Clark for Intervening Defendants	74	Synopsis	444
7	Opinion of Supreme Court, July 22, 1912	90	Synopsis	444
8	Printed Record in U. S. Sup. Court	90	Synopsis	445
8-A	Decree of Sup. Ct., July 22, 1912	90	Synopsis	445
359				
8-B	Bill of Complaint, Aug. 17, 1912	91	Synopsis	445 to 449
8-C	Demurrer of Fletcher Paper Co. et al.	91	In full	449 to 450
8-D	Demurrer of M. R. C.	91	Synopsis	450
8-E	Objections, etc., of Fletcher Paper Co. et al., to application for preliminary injunction	91	Synopsis	450
8-F	Answer of M. R. C. on Application for Injunction.	92	Synopsis	451
8-G	Opinion of Federal Dist. Ct. Mar. 22, 1913	92	Reference to page Fed. Rep.	451 451
8-H	Order of District Ct., Mar. 22, 1913	92	Synopsis	451
360				
8-I	Motion of M. R. C. to dismiss Complaint	92	Synopsis	451

No. of Ex.	Name of Exhibits. (See index in main record for substance.)	Page main record.	How exhibits set forth.	Page exhibit record.
8-J	Motion of Fletcher Paper Co. to dismiss Bill of Complaint	92	(Ex. 8-I)	451
9	Motion filed in U. S. Supreme Court, Sept. 24, 1914	93	Synopsis	452
10	Brief for Appellant	93	Explanation	452
11-13	Briefs in same Case	93	Explanation	452
14	Opinion of Supreme Court of Mich., July 25, 1914	93	Synopsis	452
15-20	Records and Brief in last case	93	Reference	452
361				
21	Opinion of U. S. Supreme Court, Dec. 14, 1914	93	(235 U. S. 402)	452
22	Decree of Fed. Dist. Court, Dec. 28, 1914	94	Explanation	453
23	Opinion of Michigan Supreme Court, Feb. 4, 1914	94	Reference	453
24-26	Record and Briefs	94	Reference	453
27	Opinion of Michigan Supreme Court	94	(182 Mich. 284)	453
28-34	Motions and Briefs	94-95	Reference	453
W. P. Dep. Ex. 34-35	Interest computation by periods	137-142		
H. E. F. Dep. Ex. 1	Pamphlet Tech. Ass'n Pulp & Paper Industry	101		
362				
H. E. F. Dep. Ex. 2	Pl'ff's Record Books	132		
M. W. Dep. Ex. 3	Statement expense bills logs shipped by rail 1909-1914	128		
M. W. Dep. Ex. 4	Shipping Book	130		
Ex. 39	Pl'ff's Incorporation Papers	96		
40	Expense bills making Bill of Particulars	96		

No. of Ex.	Name of Exhibits. (See index in main record for substance.)	Page main record.	How exhibits set forth.	Page exhibit record.
41	Pl'ff's Bill of Particulars	98		
42	Stipulation to Pl'ff's Bill of Particulars	98		
43	Depositions taken Oct. 22, 1916	99		

363 *Supplement to Bill of Exceptions Containing Exhibits Common to All Cases.*

EXHIBIT 1.

Printed Record in so-called "Rate Case," Reported in 171 *Michigan,* 335.

Exhibit 1 contains the following:—

1. Testimony and proceedings before the Michigan Railroad Commission dated from February 23, 1909, to November 3, 1909, and consisting of 123 printed pages. On the hearing before the Commission three witnesses were sworn on behalf of the petitioners and four witnesses were sworn on behalf of the respondent Detroit & Mackinac Railway Company.

2. Complainant's bill of complaint filed in the Circuit Court for the County of Wayne in chancery on November 20, 1909, as amended, May 31, 1910.

3. Order to show cause and proof of service.

4. Stipulation in regard to order to show cause.

5. Petition of the Fletcher Paper Company for leave to intervene.

6. Petition of Frank W. Gilchrist, Churchill Lumber Company and Island Mill Lumber Company for leave to intervene.

7. Order permitting the above named parties to intervene.

8. Answer of Michigan Railroad Commission.

9. Answer of Fletcher Paper Company.

10. Answer of Frank W. Gilchrist, Churchill Lumber Company and Island Mill Lumber Company.

364 11. Amendments to the Complainant's bill of complaint.

12. Answer of Michigan Railroad Commission to amended bill of complaint.

13. Answer of Fletcher Paper Company to amended bill of complaint.

14. Answer of Frank W. Gilchrist, Churchill Lumber Company, and Island Mill Lumber Company to amended bill of complaint.

15. Testimony of various witnesses taken in the Circuit Court for the County of Wayne in chancery upon the issues raised by the pleadings filed in said court, said testimony consisting of 538 printed pages, taken in the manner and form usual in chancery cases, and comprising the testimony of nine witnesses who were sworn on behalf of the complainant and of seventeen witnesses sworn on behalf

of the defendants. Complainant introduced in evidence thirty-nine exhibits and defendants sixty exhibits in addition to those introduced in evidence before the Railroad Commission. The taking of testimony was commenced on the first day of June, 1910, and completed on the 15th day of August, 1910.

16. Certificate of resubmission to Michigan Railroad Commission.

17. Opinion of Michigan Railroad Commission to the effect that its former orders should not be rescinded.

18. Opinion of Wayne Circuit Judge.

19. Complainant's motion for re-hearing and proceedings therein.

20. Decree of the Circuit Court for the County of Wayne in chancery, dismissing the bill of complaint.

21. Complainant's claim of appeal in the usual form in chancery proceedings.

365 22. Complainant's bond on appeal in the usual form in chancery proceedings.

The following parts of Exhibit 1 were separately marked and offered, viz:

EXHIBIT 1 A.

Defendant's Tariff Known as M. R. C. 205.

M. R. C. No. 205. G. F. D. 555.
Cancels M. R. C. No. 198. Cancels G. F. D. No. 548.

Advance Reduction.

Detroit & Mackinac Railway Company,
"Turtle Route."

Local Freight Tariff on Logs (all Kinds, Carloads).

Minimum, 2,500 Feet per Car.

To Alpena, Mich.

From		Rates per thousand feet.	From		Rates per thousand feet.
Alcona	Mich.	$3.00	Harrisville,	Mich.	$3.00
Aloha	"	3.25	Hurst (Hurst Branch)	Mich.	3.00
Au Sable	"	3.25	La Rocque	"	3.00
Black Lake Quarry (Black Lake Branch)	Mich.	3.25	*Le Grand	"	3.25
Black River	"	3.00	Lincoln	"	3.25
Bolton	"	3.00	*Martindale Spur (Tubbs Branch)	Mich.	3.00
Bunton	"	3.00	Metz	"	3.00
Case	"	3.25	Mikado	"	3.25
Cathro	"	3.00	Millersburg	"	3.25
Cheboygan	"	3.25	*Mill Spur (Indian River Branch)	Mich.	3.25
*Clark's Mill (Cleveland Branch)	Mich.	3.25			

366

*End of Kimball Branch	Mich.	3.00	Onaway	"	3.25
*End of Wolverine Branch,	Mich.	3.25	Ossineke	"	3.00
*Gilchrist Spur (Laugh Branch)	Mich.	3.25	*Paxton	"	2.50
Greenbush,	Mich.	3.25	Polaski	"	3.00
Gustin	"	3.25	Posen	"	3.00
Handy	Mich.	3.25	Tower	"	3.25
			Waveland	"	3.25

The rates from intermediate points will be the same as the rates from the next more distant point from which rates are named:

A refund of 50 cents per thousand feet on logs will be made when an equal amount of manufactured product is shipped out via the Detroit & Mackinac Railway.

Issued, Jan. 20, 1909. Effective, Feb. 1, 1909.

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*No regular train service. Shipments from these points handled at our convenience only.

EXHIBIT 1 B.

Defendant's Tariff Known as M. R. C. 208.

M. R. C. No. 208 (Corrected) — G. F. D. No. 560 (Corrected)

Cancels M. R. C. No. 2. Re-issue Reduction. — Cancels G. F. D. No. 104.

Detroit & Mackinac Railway,
"Turtle Route."

Local Freight Tariff on Bolts and Logs, all kinds, minimum weight on bolts 40,000 pounds per car between local stations
367 on Detroit & Mackinac Railway.

Distance (Notes) not to exceed	Rate on bolts in cents per 100 lbs.	Rate on logs per 1,000 feet.	Minimum charge per car on logs.
10 miles	¾	$1.00	$3.00
20 miles	1	1.33	4.00
30 miles	1¼	1.67	5.00
50 miles	1½	2.00	6.00
80 miles	1¾	2.33	7.00
100 miles	2	2.67	8.00
125 miles	2¼	3.00	9.00
150 miles	2½	3.33	10.00

NOTE.—In arriving at correct distances, this tariff is governed by Local Distance Table G. F. D. No. 565, M. R. C. No. 211 and supplements thereto and reissues thereof.

The rates named herein apply only when the manufactured product is to be reshipped via Detroit & Mackinac Ry. and in the absence of tariff named specific rates.

Issued February 8, 1909. Taking effect February 20, 1909. Issued to supersede original tariff by authority Michigan Railroad Commission, file 11295, D. & M., Feb. 11, 1909.

EXHIBIT 1 C.

Complaint of Fletcher Paper Company, Dated February 23, 1909.

D-180.

368 Complaint Case No. 1.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

FLETCHER PAPER CO., ALPENA, MICH.,

vs.

DETROIT & MACKINAC RAILWAY CO.

The petition of the above named Fletcher Paper Co., respectfully shows:

1. (State occupation and place of business.) Manufacturers of Pulp and Paper, Alpena, Mich.

2. That the above named Railroad Company is a common carrier, engaged in the transportation of persons and property by railroad between points in the State of Michigan.

3. That (here state concisely the matters intended to be complained of, numbering each succeeding paragraph).

1.

We charge that the D. & M. Railroad, in making rates, does it without uniformity for the length of haul, greatly to the detriment of Alpena shippers and that there is no just or equitable tariff made by this road on lumber products as illustrated by the following quotations of their rates:

2.

That logs are hauled from points as far south as Greenbush, 39½ miles below Alpena, and from Paxton, 10 miles west of Alpena, through Alpena to Onaway—a total distance of 84 miles and 57 miles respectively—at $1.50 per thousand feet.

369

3.

That from these points south and west to Alpena alone, a distance of 39½ miles from Greenbush and 10 miles from Paxton, the rate is $2.50 per thousand feet.

4.

That, from the end of the Hurst Branch to Alpena, a distance of 34 miles, the rate is $3.00 per thousand feet and from the end of the same branch to Cheboygan, a distance of 49 miles, the rate is $2.00 per thousand.

5.

Our rate originally for timber for pulp purposes from around Onaway to our mills at Alpena was $1.75. This has been raised until now the quoted tariff is $3.25 for the same length of haul. Whereas the other rates to Onaway and Millersburg points remain fixed by contract.

6.

Logs from the end of the Tubbs Branch to Cheboygan—a distance of 37 miles—are hauled at a $2.00 rate. From the end of the Tubbs Branch to Alpena—a distance of 46 miles—the rate is $3.25.

7.

With some of these Alpena rates, a 50c rebate is offered.

8.

Again, logs from points beyond Onaway are hauled to Onaway at a $1.50 rate. The rate on lumber from Onaway to Bay City is 6½c per cwt., based on 4,000 lbs. to the thousand feet would be $2.60, or a total from the stump to Bay City, of $4.10. Whereas, logs from the same points to Alpena are hauled at a rate of $3.25. The rate on lumber from Alpena to Bay City is 6c, based on 4,000 lbs. to the thousand feet—$2.40, or a total of $5.65, a dis-
370 crimination of $1.55 against Alpena for the shortest haul on the highest class.

9.

The same rate is made on "Sugar" stone from the Black Lake quarry—six miles north of Onaway and 52 miles north of Alpena—to Bay City that is made from Alpena to Bay City—a shorter haul by 52 miles.

10.

Also that the officers of the D. & M. Railroad are personally interested in the Black Lake quarry.

11.

The following is a comparative statement of rates per hundred pounds on shingle bolts and shingle logs from points along the D. & M. to Alpena and beyond:

Onaway to Ossineke, 60 miles.....1¾c
Millersburg to Ossineke, 51 miles.....1½c
Metz to Ossineke, 38 miles.....1½c
La Rocque to Ossineke, 42 miles.....1½c
Posen to Ossineke, 32 miles.....1½c
Cathro to Ossineke, 22 miles.....1¼c
Bolton to Ossineke, 25 miles.....1¼c
Onaway to Alpena, 47 miles.....3½c
Millersburg to Alpena, 38 miles.....3½c
Metz to Alpena, 25 miles..... 3c
La Rocque to Alpena, 29 miles..... 3c
Posen to Alpena, 19 miles.....2½c
Cathro to Alpena, 9 miles..... 2c
Bolton to Alpena, 12 miles..... 2c

12.

We consider that our rate on material used for pulp should be lower than the log rates, as we use a poorer class of material by at least 25 per cent than the same timber when used by the
371 sawmills. And that our former rate of $2.25 per thousand feet for an average haul of 50 miles is all the conditions warrant, and is a higher rate than is charged by the Michigan Central for an equivalent haul. And we ask that the Railroad Company be required to publish a rate on forest products used for papermaking at not to exceed $2.95 per thousand feet when inside of the sixty-mile haul.

13.

We ask that the Detroit & Mackinac Railroad be ordered to give an equitable and fair rate to all shippers alike, length of haul and class of material being taken into consideration.

Wherefore complainant prays that the aforesaid Railroad Company be required to answer the charges herein, and that after due hearing and investigation an order be made commanding said Railroad Company to cease and desist from said violations of the acts referred to in said petition, and for such other and further order as the Commission may deem necessary and just in the premises. (Prayer may be varied so as to ask for the ascertainment of lawful rates or practices, and an order requiring the carrier to conform thereto.)

Dated at Alpena, Michigan, this 23rd day of February, A. D. 1909.

FLETCHER PAPER COMPANY.

(Sgd.) FRANK W. FLETCHER, *Pres.*,
Complainant.

372 EXHIBIT 1 D.

Answer of Detroit & Mackinac Railway Company to Complaint of Fletcher Paper Company (Ex. 1 C).

Answer.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

FLETCHER PAPER COMPANY, Complainant,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

This defendant reserving to itself all right of exception to the many errors, inconsistencies and mis-statements in complainant's petition contained, for answer thereto or for as much thereof as this defendant is advised it should answer, respectfully shows unto this commission as follows:

I.

It admits that it is a common carrier engaged in the transportation of persons and property by railroad between points in the State of Michigan, and that the complainant is engaged in the manufacture of paper and the reduction of certain logs to pulp for such business; it is also advised and therefore avers that said complainant runs a saw mill in connection with its said business and all of the accessories pertaining thereto, but that none of the product of said saw mill, or any part thereof, is used for commercial purposes.

373 It denies the allegations contained in paragraph 1 of said petition and avers that said complainant is not engaged in the commercial lumber business in the City of Alpena or elsewhere, and has no interest whatever in logs transported from Greenbush, Paxton or Onaway, to Alpena, for commercial purposes.

II.

This defendant denies the matters set forth in paragraph 2 of said petition, and denies the matters and things set forth in paragraphs 3 and 4 of said petition; as paragraphs 2, 3 and 4 properly relate to the same charges. This defendant avers that said complainant is not engaged in the lumber business at Alpena, or elsewhere, and is not interested in the shipment of logs or lumber for commercial purposes, and denies the right of said complainant to inquire into and complain of said matters in which it is not interested; and insists, as an answer thereto, that the people who are

engaged in the business complained of, are abundantly able to speak for themselves, and are not asking any complaint either to this Commission or to this defendant.

III.

This defendant, in answer to paragraph 5 of said petition, admits that said complainant is engaged in the paper manufacturing industry at Alpena and in no other business; that for a number of years it had a tariff rate of $2.25 for the hauling of its logs for pulp and paper purposes, while the rate to commercial lumbermen for the same hauling was $2.75; that complaint having been made
374 that this defendant was discriminating in the hauling of its logs against the commercial lumbermen of Alpena and in favor of the complainant, this defendant thereupon wrote a letter to this Commission asking said Commission if it could continue to give this complainant the $2.25 tariff rate for logs, manufactured into paper, as against the $2.75 rate to commercial lumbermen for logs manufactured into lumber; that after the consideration this Commission informed said defendant that said rate would be a discrimination and advised this defendant to discontinue the same. And this defendant avers, that it immediately mailed to Mr. Frank W. Fletcher, president of the complainant company, the letter received from said Commission, and informed Mr. Fletcher that thereafter his rate would be precisely the same as the commercial lumbermen, $2.75; that thereupon the complainant, through its president, Mr. Frank W. Fletcher, became extremely angry and discovered that it was being "discriminated" against, and made this complaint to the Commission.

In answer to paragraphs 6, 7, 8 and 9 of said petition, this defendant avers that said complainant is not engaged in either the lumber business or in any business that requires "sugar" stone or any other sort of stone; it denies the allegation contained in said paragraph and insists that no one, engaged in such business in the City of Alpena, or elsewhere, has made complaint to this Commission or to this defendant with reference to tariff rates on such products; that as the Fletcher Paper Company, said complainant, is not engaged in any business connected with the shipment of stone or lumber and is not interested therein in any way whatsoever, such complaint cannot be taken cognizance of by this Commission.

375 IV.

In answer to paragraph 10 of said petition, this defendant avers that neither the president, vice-president or the manager of the Detroit & Mackinac Railway Company, are interested in the so-called Black Lake Quarry. And it avers that said allegation was made by complainant for the purpose of prejudice and for no other purpose.

V.

In answer to paragraph 11 of said petition, this defendant again avers that the Fletcher Paper Company, said complainant, is not engaged or interested in the shipment of shingle bolts or shingle logs, either at Alpena or elsewhere, and that the allegations contained in said paragraph cannot be considered by said Commission inasmuch as the people interested in such business have made no complaint either to this Commission or to this defendant of the rates charged thereon.

VI.

In answer to paragraph 12 this defendant avers that it is willing to ag-ee that the complainant considers, "that our rate on material used for pulp should be lower than the log rate, as we use a poorer class of material by at least 25 per cent than the same timber used by the saw mills." This defendant avers, however, that in the shipment of said logs, even at the same rate fixed for commercial Lumbermen, said complainant gets a large advantage of the lumbermen in the fact that the logs shipped to the complainant
376 for pulp and paper purposes are scaled by a merchantable scale, which means that the defendant allows complainant for defects, and in this manner hauls over 15 per cent more weight than it gets paid for according to said scale allowance for slabs and sawdust, etc., on said logs; that many of the hemlock logs hauled by said defendant for said complainant, according to this merchantable scale are afterwards peeled by said complainant after unloading from defendant's cars; so that, as a matter of fact, this defendant is hauling all of the bark from the hemlock logs which is sold and disposed of by this complainant, for nothing. Even the slabs, which are allowed complainant by the defendant under this merchantable scale, are used by said complainant, and those that are not used by it are sold and disposed of in the city of Alpena. This defendant avers that under this scale and allowance made to this defendant by this complainant, it is still receiving a decided advantage over the commercial lumbermen who ship good logs for lumber purposes; and that, at the common rate of $2.75 per thousand, it has an advantage of over 15 per cent over the commercial lumbermen at the present time.

This defendant avers that the only purpose complainant had in filing this petition was for the purpose of securing an advantage over the commercial lumbermen of its own city of fifty cents per thousand feet in the shipment of its logs; that owing to the recent fires in the vicinity of Alpena and the consequent lumbering which will have to be done during this spring and summer, the complainant has asserted that it will haul not less than five million feet of logs to Alpena. If complainant could get this amount of logs hauled this summer at a rate of fifty cents per thousand feet
377 less than the commercial lumbermen, it would obtain an advantage over the commercial lumbermen of at least

twenty-five hundred dollars on this haul alone; after these logs are hauled to Alpena, neither this Commission nor this defendant has any power to prevent the complainant from diverting these logs, and having them sawed in the various saw mills in the City of Alpena, converted into lumber and disposed of for commercial purposes. And this defendant on information and belief charges that said complainant has at various times within five years last past diverted many of the logs which were hauled for it at the reduced rate, had them sawed into lumber and disposed of this lumber upon the market at an advantage of fifty cents per thousand feet over its neighbors in the City of Alpena.

This defendant avers, however, that this Commission has already, by a letter to this defendant, settled and adjudicated the matters contained in said paragraph 12, by informing this defendant that no discrimination should be made in its tariff rates for the shipment of logs, for pulp and paper purposes, and the shipment of logs for the lumber trade.

VII.

Inasmuch, therefore, as the only matters in which the complainant is interested in any manner, as set forth in said complaint, is the shipment of logs for pulp and paper purposes, and as this Commission has already settled this point by a letter directed to this defendant, a copy of which was served upon said complainant, this defendant therefore asks that said petition be dismissed,
378 with its reasonable costs and charges in this behalf sustained.

DETROIT & MACKINAC RAILWAY COMPANY,
By J. D. HAWKS,
Vice-President and General Manager.

JAMES McNAMARA,
General Attorney.

EXHIBIT 1 E.

Local Freight Tariff, Dated March 3, 1909.

This was effective March 14, 1909 and increased the switching charge between Alpena and Broadwell's (or Fletcher's) Dam from two dollars to five dollars per car.

EXHIBIT 1 F.

Complaint of Fletcher Paper Company, Dated March 11, 1909.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

Complaint No. 2.
D-179.

FLETCHER PAPER COMPANY

vs.

DETROIT & MACKINAC RAILWAY CO.

The petition of the above named Fletcher Paper Company, respectfully shows:

1. (State occupation and place of business.) Manufacturers of wrapping paper, doing business at Alpena, Michigan.

2. That the above named Railway Company is a common
379 carrier engaged in the transportation of persons and property by railroad between points in the State of Michigan.

3. That (here state concisely the matters intended to be complained of, numbering each succeeding paragraph).

We ask that the Detroit & Mackinac Railway Company be restrained from enforcing their local Freight Tariff G. F. D. 573, registered on Folio H 2648, page 19, of the Tariff Book for the following reasons:

1.

Said rate is a personal one to the Fletcher Paper Company on switching between their Groundwood Mill—four miles up the river, by rail—to their Paper Mill in the city, all Groundwood coming from the upper mill to the lower by local switching.

2.

When these mills were built in '99, J. D. Hawks, then in charge of the road and still in charge, gave by letter a rate of $2.00 per car on said switching.

3.

Said rate has been in force until now and is now raised 150 per cent one way and 60 per cent the other, namely: From $2.00 down to $5.00 and from $3.00 up to $5.00.

4.

The commodity handled is wet pulp, being 65 per cent water and in volume amounts to 12,000 to 14,000 tons—gross weight—per year.

5.

Again this commodity pays this railroad company three separate and distinct rates on a haul of 175 miles, we paying on the
380 wood into the mill, switching charge between the two mills, and an outhaul on all paper.

6.

Our freight haul on wood to the mill is, per cord.....	$1.00
The switching charge on an equivalent amount of wood for the four miles is, per cord ..... reducing it to that basis.	.25
And taking the finished paper on a proportionate rate along of 4½c, where it takes 1½ cords of wood to produce a ton of paper, it would make the outhaul as finished paper on each cord of wood, per cord..... reduced to that basis.	.60
Or a total of	$1.85

paid this railroad company for each Cord of wood handled by them, or used by us as we give them all of our business, they getting the outhaul on the river wood as well as the rail wood.

7.

With this showing, we claim that a raise of 150 per cent at this time is unfair switching charges and we claim that this raise is not forced by any conditions of the business, but is put upon us for the reason that we have been active in opposing some of the unequal freight rates of this road and that the whole action at this time is retaliatory and that

They have raised our rates on both logs and switching.

Have refused to place our loaded cars at the mill.

381 Have refused to handle our ashes as formerly.

And have taken several and divers steps to impede our business as retaliatory measures, for our stand with reference to themselves.

And we ask that they be enjoined from enforcing this freight rate until such time as a proper and fair hearing may be given before your honorable body.

Wherefore complainant prays that the aforesaid Railway Company be required to answer the charges herein and that after due hearing and investigation an order be made commanding said Railway Company to cease and desist from said violations of the acts re-

ferred to in said petition, and for such other and further order as the Commission may deem necessary and just in the premises. (Prayer may be varied so as to ask for the ascertainment of lawful rates or practices, and an order requiring the carrier to conform thereto.)

Dated at Alpena, Michigan, this eleventh day of March, A. D. 1909.

FLETCHER PAPER COMPANY,
FRANK W. FLETCHER, *President,*
Complainant.

Exhibit 1 G.

Answer of Detroit & Mackinac Railway Company to Ex. 1 F.

Answer.

STATE OF MICHIGAN:

Before the Railroad Commission.

382 Case No. 2. Docket No. 179.

FLETCHER PAPER COMPANY, Complainant,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

This defendant, the Detroit & Mackinac Railway Company, reserving to itself the right of exception to the inaccuracies and misstatements contained in the petition filed by said complainant, for answer thereto, says:

This defendant denies the matters and things alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, of Complainant's petition; and, inasmuch as these seven separate paragraphs relate to the same subject, excluding a reply seriatim without confusion and repetition, this defendant, in answer to the complaint contained in said paragraphs, says:

Defendant alleges that Freight Tariff G. F. D. 573, mentioned in paragraph one, calls for a rate of Five Dollars ($5.00) per loaded car each day between Alpena and Broadwell's Dam, which rate we claim to be proper one for the following reasons:

I.

In 1898 the Detroit & Mackinac Railway Company spent four thousand ninety-three and 31-100 ($4,093.31) dollars in putting in a spur track leading from the main track towards Broadwell's Dam where the Fletcher Paper Company were putting in a new dam and a mill for making paper pulp by grinding wood. In 1899 the Detroit & Mackinac Railway Company spent twelve hundred seventy-eight and 4-100 ($1,278.04) dollars in extending this

spur track, making over two and one-half miles of track
383 which the Detroit & Mackinac Railway Company has maintained from that time to this, and is still maintaining. The Detroit & Mackinac Railway Company has also spent large sums of money in building and maintaining logging branches for said Fletcher Paper Company, which expense can only be recouped to the railway through its switching rates and log rates. At the time of the building of said mill at the Dam, the complainant, the Detroit & Mackinac Railway Company, made a switching rate of Two Dollars per loaded car of ma*un*factured product from said dam to Alpena, and Three Dollars per loaded car from Alpena to the dam.

These rates were considered fair at the time as, in those days, it was considered proper for railroads to foster new industries by giving low rates for a time, and by carrying material and machinery at half the published tariff rates.

The half rate practice has been stopped by the laws under which the railroads and the Interstate Commerce Commission and the State Railroad Commission are working; and we submit, as a fair proposition, that ten years is long enough for fostering infant industries by the railroad giving less rates than other shippers are getting.

No contract is in force now or ever was in force calling for these low rates.

At the time the low rates were made the Fletcher Paper Company was paying $2.50 per thousand feet for hemlock logs.

For the same logs they are now paying $7.50 per thousand feet. Paper is selling much higher now than then.

These prices for complainant's product, according to its
384 petition, seem to be all right, but for the railroads to ask a fair price for its work is all wrong.

II.

The Detroit & Mackinac Railway Company's switching rate in Alpena is $3.00, $4.00 and $5.00 per car, according to the capacity of the car, but Broadwell's Dam, where complainant's "Groundwood Mill" is located, is outside the switching limits, and it is necessary to use three miles of the main track to reach the spur track or two and one-half miles leading to this dam; and all movements have to be made under train orders with an added risk of accident and delay. This switching is done to the dam by this defendant, at an actual expense for engine and crew of from $5.00 to $6.00 per car, all of which is exclusively for the benefit of the Fletcher Paper Company, as there is no other industry along the route.

At the time the $2.00 and $3.00 rates were made, when this defendant bought ties of the Fletcher Paper Company, it paid sixteen cents each. It it buys ties of them now it is obliged to pay forty cents to fifty cents. It paid then three cents for fence posts; it now pays eight cents to ten cents. It paid $2.50 per thousand feet for hemlock lumber, it now pays $8.00.

Complainant at that time received for its hemlock bark $3.00 per

cord; it now gets $7.50 per cord, and other things in the way of labor and material have advanced in like proportion including the price of wrapping paper and pulp, the product of the mills of said complainant.

The commodity handled from Alpena to said dam for said complainant is mostly bolts for pulp which have a certain rate into Alpena from the north, but which require a separate switching movement to get them to Broadwell's Dam, as the Fletcher Paper Company has no facilities for taking care of cars at the junction of the spur to dam with defendant's main track. There is also a small quantity of coal handled from Alpena to the dam; but from the dam to Alpena, the commodity mostly handled is paper pulp, a manufactured article.

385

III.

Complainant's claim that it is 65 per cent water, has no bearing. Whiskey and beer have a much larger per cent of water, but the freight rate on these is much higher than on paper pulp. For the purpose of this complaint, pulp, it may be stated, pays only one charge, viz: the switching charge. It is admitted that there are other charges before the pulp is turned out of the mill and loaded in cars, such, for instance, as the purchase of the land on which the timber grows, or the purchase of standing timber; then comes another charge for cutting the timber, another charge for hauling and skidding, another charge for loading on the cars, another charge for freight to Alpena, another charge for switching the logs from Alpena to Broadwell's Dam, and another charge for unloading the logs; but all of these charges, except switching charge, are those in which the railroad has no interest.

The figuring in Paragraph 6, of the complaint, appears to be based on the freight rate of bolts, with which rate the Fletcher Paper Company has expressed itself as perfectly satisfied. It merely shows that paper gives much less revenue to the railroad than lumber when, if the price of the commodity, say about five times as much per ton as lumber, is taken into consideration, it should give much more.

386

IV.

Section 6234, of the Compiled Laws of this State, Subdivision 7, relating to the rates to be charged for the transportation of freight by railroads, says:

"That in transporting freight by the car, loaded by the shipper, and unloaded by the consignee, no railroad company shall charge for transporting each of said cars more than eight dollars for any distance not exceeding ten miles; nor more than fift*f* cents per mile for the second ten miles, nor more than twenty-five cents per mile for the third ten miles," etc.

This statute was held to be constitutional by the Supreme Court of this state in the case of Robinson vs. Harmon, Receiver, last October, and is reported in Volume 15, D. L. N., page 711.

Looking at it from the standpoint of this statute the defendant is entitled to charge $8.00 a car for this switching, instead of $5.00; and, for a distance of 50 miles, $20.50 per car for logs, instead of the rate complained of viz: $6.87½ per car of 2,500 feet at $2.75 per thousand.

Even the higher rate mentioned might not result in an earning for the defendant of the 8 per cent on valuation of the road, which 6 per cent has recently been declared by a United States Court to be a fair and equitable return.

V.

387 Paragraph 7 alleges that the defendant has refused to place loaded cars at its mill. This is in accordance with a request of the Michigan Car Demurrage Bureau, which claimed that payment of a bill of $25.00, for detained cars, was refused by complainant although promised many times. The defendant company paid as part of the expenses of this Bureau for the year 1908, $1,343.07; and, as the Bureau was established as much for the benefit of the shippers as for the railroads and as complainant is a member thereof, the railroad cannot well refuse, when requested, to help the Bureau in its efforts to have the Fletcher Paper Company live up to its contract with the Bureau, the same as other shippers.

The action of refusing to place loaded cars on private sidings is one provided in the contract with the Bureau which the Fletcher Paper Company signed and agreed to. And this complainant has already elected its remedy with reference thereto by a Bill of Complaint filed in the Alpena Circuit Court, which cause was commenced prior to filing this complaint and is still pending in said Court. The letter attached hereto, and marked Exhibit "A", from the Fletcher Paper Company to C. W. Luce, General Superintendent of the defendant company under date of March 9th, 1909, shows how impossible it will be for the defendant to handle cinders and ashes free. The letter states that this free handling of cinders and ashes was a rebate on the coal rate, and that in return for same the complainant gave defendant a large tonnage of coal. Free handling of ashes and cinders is nowhere mentioned in defendant's coal tariff, and is a thing it could not do for all other users of coal, and hence, a discrimination pure and simple, in favor of the complainant.

388 In general, the defendant claims that all of the rates complained of are low, especially when figured on the rate per ton per mile; and are made at this time in an effort to harmonize the railroad tariffs with the laws of the United States and the State of Michigan, through the desire of the defendant to comply with each and every ruling of the Interstate Commerce Commission and the State Railroad Commission.

DETROIT & MACKINAC RAILWAY COMPANY,
Per J. D. HAWKS.

JAMES McNAMARA,
General Attorney.

"EXHIBIT A."

MARCH 9TH, 1909.

C. W. Luce, Gen. Supt., East Tawas, Mich.

DEAR SIR: Last week at the request of your road here, we loaded four cars of cinders for you, these being sent somewhere along the line. Today we are notified that cinder cars hereafter will be charged switching rates.

As the cinder arrangement was made on account of the advantage to both of us, you getting fully as much out of it as we, and in return for same, we giving you a large amount of coal—in the neighborhood of 20,000 tons a year, I wish to know whether this policy is adopted as a matter of retaliation in petty ways because we are having a difference in opinion on large matters and whether it is to be your policy hereafter to hamper in every petty way you can the transaction of general business.

389 If this is the case, I should like to know it and we will govern ourselves accordingly. If not, please let me know what your attitude is going to be with reference to the handling of our cinder refuse as if you do not wish to carry out the old arrangement of ours, we will make other disposition of our waste material and in return we can use much more water coal than we have been using.

Our antagonism to the attitude of the railroad with reference to its tariff has been fair and above board and we have not stooped to any petty measures. Your retaliation has been questionable, and it is only fair for you to state now whether that is to be the position taken by the railroad in all matters or whether you will act fairly in business transactions especially where they are mutually advantageous.

An early reply will oblige.

Yours very truly,

FRANK W. FLETCHER.
FLETCHER PAPER COMPANY.

EXHIBIT 1 H.

Complaint of F. W. Gilchrist et al., Dated April 19, 1909.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

F. W. GILCHRIST, CHURCHILL LUMBER CO., ISLAND MILL LUMBER CO.

vs.

DETROIT & MACKINAC RAILWAY CO.

The petition of the above named respectfully shows:

1. (State occupation and place of business.) Manufac-
390 turers of lumber and other articles made from logs, Alpena, Mich.

2. That the above named railroad company is a common carrier, engaged in the transportation of persons and property by railroad between points in the State of Michigan.

3. That (here state concisely the matters intended to be complained of, numbering each succeeding paragraph).

The said Detroit & Mackinac Railway Company is charging higher rates for the transportation of logs, carloads, to Alpena, Michigan, than they charge for transporting the same articles for the same relative distances to Cheboygan, Michigan, and that the rates now published in Detroit & Mackinac Railway tariff M. R. C. No. 205 to Alpena, Michigan, are unjust and unduly discriminatory.

4. That the said Detroit & Mackinac Railway Company is charging for the transportation of logs, carloads (the manufactured product of which is reshipped via Detroit & Mackinac Railway) higher rates than published in their tariff M. R. C. No. 208, which is a mileage scale showing rates for certain distances, applying when the manufactured product is reshipped via Detroit & Mackinac Railway.

Comparison of the present published rates of the Detroit & Mackinac Railway on logs to Cheboygan, with those published to Alpena, shows that the former point enjoys a much better basis of open rates (i. e., rates which are not made contingent on the reshipment of the manufactured product), than Alpena, in spite of the fact that Cheboygan is a competitive point, and it is not only possible,
but the mills do ship more of the manufactured product via
391 Michigan Central than via Detroit & Mackinac Railway.

Alpena has only one railroad, the Detroit & Mackinac Railway, but it has the advantage of water transportation in addition. This, however, is a limited advantage, because it is not possible to reach all, or even a majority of the consuming points by boat. The car trade is more valuable to the shipper as it enables

him to sell direct to the consumer, and it is constantly increasing as compared to shipments by water. The above facts prove that Alpena is justly entitled to the same basis of rates on logs inbound, as is now published to Cheboygan.

Wherefore, complainants pray that the aforesaid railroad company be required to answer the charges herein, and that after due hearing and investigation an order may be made commanding said railroad company to cease and desist from said violations of the acts referred to in said petition, and to publish and file with the Michigan Railroad Commission rates shown on attached statement.

Dated at Alpena, Mich., this 19th day of April, A. D. 1909.

F. W. GILCHRIST,
Per RALPH GILCHRIST,
CHURCHILL LUMBER CO.,
Per FRED A. KIMBALL,
Pres. & Mgr.,
ISLAND MILL LUMBER CO.,
Per ROBT. H. RAYBURN, *Manager,*
Complainants.

Attached is a statement showing the rates which should apply on logs to Alpena, two cases being shown—one naming rates not contingent on the manufactured product being reshipped and
392 one showing the mileage scale which should apply when the manufactured product is reshipped via D. & M. Ry.

The explanation of the first mentioned basis is that for distances under 50 miles the same rates are asked for as apply to Cheboygan for equal distances. As the rates to Cheboygan were evidently arrived at on basis of $1.80 per thousand feet for all distances 35 miles and under, and as the $2.00 per thousand feet rate to Cheboygan does not apply for distances exceeding 50 miles, the proposed extension of the scale is as follows:

For distances 51 to 60 miles inc. $2.20 per thousand feet.
For distances 61 to 70 miles inc. $2.40 per thousand feet.
For distances 71 to 80 miles inc. $2.60 per thousand feet.

and the rates on the attached statement for distances exceeding 50 miles are arrived at on that basis.

It is a more favorable basis from the railroad's standpoint than is generally employed, for the reason that on longer distances the spread of the rate usually covers more miles, but for quick adjustment, the above basis is asked for.

So far as the mileage scale to apply on logs, the manufactured product of which is reshipped via D. & M. Ry. is concerned, this scale is already legally published by D. & M. Ry. Tariff M. R. C. No. 208, but the company contends that it will not apply when specific rates (meaning the abnormally high rates in M. R. C. 205) are in effect. The tariff publishing this mileage scale should be reissued with a notation that the rates will apply in absence of lower specific rates.

393 *Rates on Logs to Alpena, Mich.*

Open rates—without re-shipment clause.

From		Rates per 1,000 ft.	From		Rates per 1,000 ft.
Alcona	Mich.	$1.80	Hurst Br.	Mich.	$1.80
Aloha	"	2.40	La Rocque	"	1.80
Au Sable	"	2.20	Le Grande	"	2.20
Black River Br.	"	2.00	Lincoln	"	2.20
Black River	"	1.80	Tubbs Br.	"	2.00
Bolton	"	1.80	Metz	"	1.80
Case	"	2.00	Mikado	"	2.20
Cathro	"	1.80	Millersburg	"	2.00
Cheboygan	"	2.60	Indian River Br.	"	2.20
Cleveland Br.	"	2.20	Onaway	"	2.00
Kimball Br.	Mich.	$1.80	Ossineke	Mich.	$1.80
Wolverine	"	2.20	Paxton	"	1.80
Laugh	"	2.20	Posen	"	1.80
Greenbush	"	2.00	Polaski	"	1.80
Gustin	"	2.20	Tower	"	2.00
Handy	"	2.20	Waveland	"	2.20
Harrisville	"	1.80	(Minimum 2500 ft. per car)		

Contract rates—manufactured product to be reshipped via D. & M. Ry.

Distances	Rates per 1,000 ft.	Min. per car.
1 to 10 miles	$1.00	$3.00
10 to 20 miles	1.33	4.00
21 to 30 miles	1.67	5.00
31 to 50 miles	2.00	6.00
51 to 80 miles	2.33	7.00
81 to 100 miles	2.67	8.00

394 EXHIBIT 1 I.

Answer of Detroit & Mackinac Ry. Co. to Ex. 1 I.

Answer.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

D-188.

F. W. GILCHRIST, CHURCHILL LUMBER CO., ISLAND MILL LUMBER CO., Complainants,

vs.

DETROIT & MACKINAC RAILWAY CO., Defendant.

This defendant, reserving to itself all right of exception to the inaccuracies and uncertainties contained in the bill of complaint filed by the complainants in the above entitled cause, for answer thereto, says:

I.

It denies the matters and things alleged in paragraph three of complainants' bill of complaint.

II.

It denies the matters and things alleged in paragraph four of complainants' bill of complaint.

III.

395 It denies the right of the shippers of lumber at Alpena to fix a tariff schedule of rates to suit themselves, and then insist that such schedule be imposed upon this defendant by this Commission.

IV.

It denies the right of this Commission to impose any such schedule as prepared and set forth in complainants' bill of complaint, upon this defendant without its consent.

It therefore asks to be dismissed with its reasonable costs in this behalf sustained.

DETROIT & MACKINAC RAILWAY CO.,
Per J. D. HAWKS,
Vice-Pres. and Gen. Mgr.

JAS. McNAMARA,
General Attorney.

EXHIBIT 1 J.

D-189.

Order of Michigan Railroad Commission, Dated Oct. 19, 1909.

Order Railroad Commission.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

Session of the Michigan Railroad Commission held at its offices in the city of Lansing on the 19th day of October, A. D. 1909.

D-189.

FLETCHER PAPER COMPANY, Complainant,

vs.

DETROIT & MACKINAC RY. COMPANY, Defendant.

The above named Fletcher Paper Company having duly
396 filed its complaint with this Commission, charging in substance among other matters that the local freight tariff naming switching charge between Alpena, Mich., and Broadwell's Dam, (sometimes called Fletcher's Dam) M. R. C. No. 217, is unreasonable and unjustly discriminatory, and after due notice to all parties concerned, and a hearing having been had thereon and after duly considering the evidence and arguments of counsel, and it appearing to the Commission that the rate named in the local freight tariff, M. R. C. 217, to-wit: $5.00 per car in each direction on all commodities between the City of Alpena and said Broadwell's Dam, is unreasonable and unjustly discriminatory and it appearing to the Commission that $3.50 a car in each direction between said City of Alpena and Broadwell's Dam on all commodities is reasonable and just;

Now, therefore, by virtue of the authority vested in us by law, it is ordered, that said defendant, the Detroit & Mackinac Railway Company, within twenty days from the date of service of a certified copy of this order on it, file, publish, and put in force a rate for switching charge between Alpena, Mich., and Broadwell's Dam, not to exceed $3.50 per car in each direction on all commodities;

Ordered further, that M. R. C. No. 217 heretofore filed and published by said defendant, be cancelled and that said Detroit & Mackinac Railway Company cease and desist after said twenty days from charging more than $3.50 per car in each direction between Alpena, Mich. and Broadwell's Dam, for any commodity.

CASSIUS L. GLASGOW,
GEORGE W. DICKINSON,
JAMES SCULLY,
Commissioners.

397 EXHIBIT I K.

Order of Michigan Railroad Commission, Dated Oct. 22, 1909.

Order of Railroad Commission.

STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

At a session of the Michigan Railroad Commission, held at its offices in the City of Lansing, on the 22nd day of October, A. D. 1909.

D-188.

F. W. GILCHRIST, CHURCHILL LUMBER COMPANY, ISLAND MILL COMPANY, Complainants,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant.

Complaint having been made by the above named complainants charging that the above named defendant by its public tariff now in effect for the transportation of logs to the city of Alpena, State of Michigan, is charging rates that are unjust and unduly discriminatory, and issue having been joined thereon by the said parties and a hearing having been had wherein the parties were present and represented by counsel, and the evidence and arguments of counsel having been duly considered by the Commission, the Commission doth find that the matters alleged in the complaint are substantially true and that the rates charged for the transportation of logs in carload lots to said city of Alpena are unjust, unreasonable and excessive, and that said rates should be reduced as hereinafter set forth.

398 Now Therefore, By virtue of the authority vested in us by law, it is hereby ordered, that the Detroit & Mackinac Railway Company do publish, file and put into operation so as to become effective twenty (20) days from the date of the service of this order on defendant, a tariff for the transportation of logs in carload lots to the said city of Alpena, as follows:

Ten (10) miles or less, not to exceed one dollar ($1.00) per thousand (1,000) feet;

Over ten (10) miles and not exceeding twenty (20) miles, not to exceed one dollar and thirty-three cents ($1.33) per thousand (1,000) feet;

Over twenty (20) and not exceeding thirty (30) miles, not to exceed one dollar and sixty-seven cents ($1.67) per thousand (1,000) feet;

Over thirty (30) and not exceeding fifty (50) miles, not to exceed two dollars ($2.00) per thousand (1,000) feet;

Over fifty (50) and not exceeding eighty (80) miles, not to exceed two dollars and thirty-three cents ($2.33) per thousand (1,000) feet;

Above rates to apply when the manufactured product is reshipped via defendant company's line, and when not to be so reshipped, that defendant company are authorized to collect in addition to said rate, fifty cents (50c) per thousand (1,000) feet, but if later reshipment is made over defendant company's line, they are to refund to such shipper the fifty cents (50c) per thousand (1,000) feet collected and

It is further ordered, that the books of both defendant company and complainants (and all other shippers of logs affected by this order) shall show plainly the total of inbound shipments
399 and the re-shipment of the manufactured product, and

It is further ordered, that these rates apply to all classes of logs transported by said defendant to said City of Alpena within the distances above set forth.

GEORGE W. DICKINSON,
JAMES SCULLY,
Commissioners.

Exhibit 1 L.

Supplemental Order of Michigan Railroad Commission, Dated November 3, 1909.

Supplemental Order Railroad Commission.

State of Michigan:

Before the Michigan Railroad Commission.

At a session of the Michigan Railroad Commission, held at its offices in the City of Lansing on the 3rd day of November, A. D. 1909.

D-188.

F. W. Gilchrist, Churchill Lumber Company, Island Mill Lumber Company, Complainants,

vs.

Detroit & Mackinac Railway Company, Defendant.

Supplemental Order.

An order having been heretofore made in the above entitled cause,
on, to-wit, the 9th day of October, A. D. 1909, prescribing
400 the rate on carload shipments of logs to the City of Alpena, originating on the defendant company's line, and it appearing to the Commission that the minimums to be applied in the ap-

plication of the rates set forth in defendant company's tariff, on file with this Commission and described as M. R. C. No. 208. G. F. D. No. 560 (corrected), and

It further appearing that the rate applying to Fletcher's Dam (formerly Broadwell's Dam), situated on defendant company's line should be as the same rate to Alpena.

Now therefore, by virtue of the authority vested in us by law, it is hereby ordered, that the said defendant company may charge a minimum rate per car on carload shipments covered by this order the same as now appears in defendant company's tariff, described as M. R. C. No. 208, G. F. D. 560 (corrected), now in file with this commission, to-wit:

Not to exceed ten (10) miles, three dollars ($3.00) per car;

Not to exceed twenty (20) miles, four dollars ($4.00) per car;

Not to exceed thirty (30) miles, five dollars ($5.00) per car;

Not to exceed fifty (50) miles, six dollars ($6.00) per car;

Not to exceed eighty (80) miles, seven dollars ($7.00) per car;

Not to exceed one hundred (100) miles, eight dollars ($8.00) per car;

Not to exceed one hundred and twenty-five (125) miles, nine dollars ($9.00) per car;

Not to exceed one hundred and fifty (150) miles, ten dol-
401 lars ($10.00) per car; and

It is further ordered, that on all carload shipments of logs or pulp wood originating at points on defendant company's line of railroad north of Fletcher's Junction the rate to Fletcher's Dam (formerly Broadwell's Dam) shall be the same as the rate to Alpena, and that on all carload shipments of logs or pulp wood originating at points on defendant company's line of railroad south of Alpena the rate to Fletcher's Dam (formerly Broadwell's Dam) shall be the same as the rate to Alpena.

This order may be rescinded, altered or amended at any time when in the judgment of the Commission such action should be taken.

CASSIUS L. GLASGOW, *Chairman,*
GEORGE W. DICKINSON,
JAMES SCULLY,
Commissioners.

Exhibit 1 M.

Proof of Service of Above Orders.

Exhibit 1 J served November 4, 1909.
Exhibit 1 K served November 1, 1909.
Exhibit 1 L served November 6, 1909.

Exhibit 1 N.

Bill of Complaint Filed by Detroit & Mackinac Ry. Co. in Wayne Circuit Court in Chancery.

The following is a condensed summary:—

Par. 1. Description of complainant's railway.

Par. 2. Further description. Complainant owns and operates within the State of Michigan, 450 miles of track. Its prop-
402 erty is worth $4,500,000.00 and upwards.

Par. 3. Further description of property and service given to public.

Par. 4. History of railroad. Receivership, etc.

Par. 5. Reorganization.

Par. 6. Country traversed by main line unsettled and unproductive. New industries located along line of road by efforts of complainant's officials.

Par. 7. Large sums spent to build logging branches. From 1895 to 1909 built 144 miles and 4399 feet of logging branches, costing $135,233.84 for labor and $250,686.64 for rails, etc. Exclusive of Hillman branch.

Par. 8. More than 46 miles of logging branches built for Alger, Smith & Co. in 1895-1899 costing $24,100.31 for labor and $104,-209.24 for track material. Also in city of Alpena in 1895-1907 more than 12 miles of track, costing $7346.17 for labor and $23,-633.03 for rails, etc. Cost of maintenance, etc., exclusive of main line.

Par. 9. Certain branches and spurs taken up, etc., during 1895-1909 at cost of $8,844.32. All extraordinary expense for benefit of timber owners.

Par. 10. Expense unnecessary if timber had been contiguous to main line.

Par. 10½. Logging branches built through barren lands. Will become worthless within ten years. No other freight from these branches and little passenger traffic. Freight rates should not be compared with those of line passing through productive country.

Par. 11. During the last ten years there has been a steady increase in the cost of materials, labor and equipment, also in the amount of taxes paid, which amounted in 1908 to 7.42 per cent of gross earn-
ings as compared with the general average of less than four
403 per cent. Cost of hauling logs has increased, also value of forest products.

Par. 12. Sets forth a copy of M. R. C. 205 (Ex. 1 A.)

Par. 13. M. R. C. 205 took into consideration the actual cost of shipment, the increased cost of labor, materials, and equipment, and the expense connected with the construction of the logging branches. Water competition at Alpena. The fifty cent refund in M. R. C. 205 was designed as an inducement to the reshipment of the manufactured product by rail. M. R. C. 205 was neither unreasonable, unjust nor discriminatory, but just, reasonable and equitable.

Par. 14. Statistics showing that less than fifteen per cent of the manufactured product of logs shipped by rail to Alpena in 1908 was reshipped by rail.

Par. 15. Sets forth a copy of M. R. C. 208. Made for points where there was no water competition.

Par. 16. M. R. C. 205 applied to logs shipped to Alpena where there was water competition and for lumbermen who had the benefit of logging branches and who were not required to reship by rail. Ex. 208 applied to points where there was no water competition and contained express provision for re-shipment by rail.

Pars. 17-20. Description of controversy with Fletcher Paper Company and other Alpena shippers, substantially as set forth in exhibits 1-D and 1-G.

Pars. 21-22. Description of proceedings before the Michigan Railroad Commission and services of Commission's orders.

Pars. 23-25. The orders of the Michigan Railroad Commission were unjust, unreasonable, and illegal and against complainant's just rights. Will cause financial loss and irreparable injury.

404 Par. 26. Commission's orders made without actual investigation of cost of carrying logs or switching cars. Complainant's proofs irreparable injury, etc.

Par. 27. Complainant further shows that according to the terms and tenor of said orders they shall become effective within twenty days from the service of the last of the same upon this complainant; and will seriously cripple the operation of its railroad, and will injure and destroy its property rights and interests unless a temporary injunction to be issued out of and under the seal of this Court, directed to the Michigan Railroad Commission, the defendant herein, therein and thereby restraining and strictly enjoining the Michigan Railroad Commission, the defendant herein, its officers, agents, solicitors or attorneys, and each and all of them, from enforcing said orders hereinbefore described and known as Exhibits 1, 2 and 3, until the further order of this court.

Par. 28. No remedy at law, etc.

(The following paragraphs were added by amendment May 31, 1909.)

Par. 29. Logging branches not devoted to public use. Details. Therefore not within the jurisdiction of the Michigan Railroad Commission or Michigan legislation, etc. Orders complained of violate the 14th amendment to the federal constitution.

Par. 30. Commission's orders would compel complainant to haul

logs for less than cost and a fair profit, and therefore in violation of 14th amendment.

Par. 31. Value of railroad property $4,585,000. Cost of reproduction less depreciation would equal that sum. Total revenue for year ending June 30, 1909, $1,164,848.86. Operating and
405 maintenance expenses and taxes, economically and prudently incurred, were $881,389.34, leaving a net profit of $283,459.34, being a small fraction less than 6 1-5 per cent. If Commission's orders enforced, earning capacity will be seriously impaired, and reduced below the reasonable and legitimate earnings of similar railroad property, and to less than complainant is entitled to earn, etc. Orders therefore violate the state and federal constitution and laws, etc.

Par. 32. Timber gradually being exhausted. Revenue therefrom will steadily decrease and in ten or fifteen years will almost wholly cease. No other freight to take its place. Complainant should be permitted to earn ten per cent per annum and build up sinking fund. Reduction of rates resulting in impairing capital, would be in violation of constitution, and laws, etc.

Prayer for Relief.

1. That the logging spurs and branches of the complainant may be declared and decreed to be of private concern only, and not within or subject to the jurisdiction of the Michigan Railroad Commission; and that the rates charged thereon by the complainant are not subject to the regulation or control of said commission or of the State Legislature.

2. That the rates on carloads of logs to Alpena, fixed by Exhibit A of the bill, dated Jan. 20, 1909 and to take effect Feb. 1, 1909, may be declared and decreed to be reasonable and just, and that the rates fixed by the orders of the Michigan Railroad Commission of Oct. 22, 1909, Nov. 3, 1909 and Oct. 19, 1909, may be decreed and declared to be unreasonable and unjust.

3. That the rates fixed by the orders of the Michigan Railroad Commission of Oct. 22, 1909, Nov. 3, 1909 and Oct. 19,
406 1909, may be declared and decreed to seriously impair the earning capacity of the property of the complainant and to be confiscatory, and a deprivation of property without due process of law.

4. That the rates fixed by the orders of the Michigan Railroad Commission of Oct. 22, 1909, Nov. 3, 1909 and Oct. 19, 1909, may be declared and decreed to be in conflict with the constitution and laws of Michigan, and a violation of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

5. That this complainant may have such other or further relief as may be agreeable to justice and equity.

This complainant prays that a temporary writ of injunction may be issued out of and under the seal of this court restraining and

enjoining the defendant, the Michigan Railroad Commission, from enforcing or attempting to enforce its said orders, and that on the final hearing of this cause said writ of injunction may be made perpetual.

Order to Show Cause.

STATE OF MICHIGAN:

Circuit Court for the County of Wayne, in Chancery.

DETROIT & MACKINAC RAILWAY COMPANY, Complainant,

VS.

THE MICHIGAN RAILROAD COMMISSION, Defendant.

On reading and filing the bill of complaint in this cause and on motion of James McNamara, solicitor for the complainant, it is ordered that the defendant, the Michigan Railroad Com-
407 mission show cause at the opening of court to be held at the County Building in the City of Detroit, Michigan, on the 24th day of November, A. D. 1909, at 9.30 o'clock in the forenoon of said day, why a temporary injunction should not issue against said defendant as prayed for by said bill of complaint; and that service of this order and a copy of the bill of complaint be made upon said Railroad Commission at Lansing, Michigan, not later than Monday, the 22nd day of November, 1909.

HENRY A. MANDELL,
Circuit Judge.

Presiding in Chancery Division, Wayne Circuit Court.

Dated this 20th day of November, 1909.

Proof of Service.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne, in Chancery.

DETROIT & MACKINAC RAILWAY COMPANY, Complainant,

VS.

THE MICHIGAN RAILROAD COMMISSION, Defendant.

COUNTY OF WAYNE, *ss:*

James McNamara, being duly sworn deposes and says, that on Monday, the 22nd day of November, A. D. 1909, at 11.30 o'clock in the forenoon of said day he served a true and compared copy of the Bill of Complaint filed in this cause, together with the order to

show cause attached thereto, issued by Hon. Henry A. Mandell, Circuit Judge, by delivering said certified copy with a copy
408 of the order to show cause thereto attached, personally to Samuel H. Kelly, secretary of the Michigan Railroad Commission, at the offices of the Michigan Railroad Commission at the City of Lansing, Michigan.

JAS. McNAMARA.

Subscribed and sworn to before me this 23rd day of November A. D. 1909.

IRMA B. GMEINER,
Notary Public, Wayne Co., Mich.

Restraining Order.

STATE OF MICHIGAN:

No. 35, 866.

The Circuit Court for Wayne County, In Chancery.

DETROIT & MACKINAC RAILWAY COMPANY, Complainant,

vs.

MICHIGAN RAILROAD COMMISSION, Defendant.

At a session of the Circuit Court for Wayne County, Chancery division, held at the County Building in the City of Detroit, Michigan, on Wednesday, the 24th day of November, A. D. 1909.

Present: The Hon. Henry A. Mandell, Circuit Judge.

On reading the Bill of Complaint, heretofore filed in this cause, and on reading and filing due proof of the service of a copy of said bill of complaint and the order to show cause attached thereto on the Michigan Railroad Commission, wherein said Michigan Railroad Commission, was ordered to show cause in this Court on Wednesday, the 24th day of November, A. D. 1909, at nine thirty o'clock in the forenoon of said day, why an injunction should not issue as prayed for in complainant's bill of complaint; and
409 after hearing James McNamara, solicitor for compainant, said defendant failing to appear, it is ordered by the Court now here that a temporary injunction issue as prayed for in complainant's Bill of Complaint.

Said injunction to continue in full force and effect until the hearing on said order to show cause on Saturday, November 27th, 1909, and until the further order of the Court.

HENRY A. MANDELL,
Circuit Judge.

Dated, November 24th, 1909.

Injunction.

STATE OF MICHIGAN:

The Circuit Court for the County of Wayne, In Chancery.

To Michigan Railroad Commission and to its counsellors, Attorneys, Solicitors and agents and each and every of them, Greeting:

Whereas, it has been represented to us, in the Circuit Court for the County of ————, in Chancery, on the part of Detroit & Mackinac Railway Company, that it has lately exhibited its Bill of Complaint against you, the said Michigan Railroad Commission, Defendant, to be relieved, touching the matters therein complained of; in which bill it is stated amongst other things, that you are combining and confederating with orders to injure the said complainant touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we, therefore, in consideration thereof, and of the particular matters in the said bill set forth, do strictly com-
410 mand you, the said Michigan Railroad Commission, and the persons before mentioned, and each and every of you, under penalty of Ten Thousand Dollars, to be levied on your lands, goods and chattels, to our use, that you do absolutely desist and refrain from putting into operation or making effective, three orders of said Michigan Railroad Commission directed to the Detroit & Mackinac Railway Company, said complainant, dated respectively October 22nd, 1909, October 19th, 1909 and October 19, 1909 known and set forth in complainant's bill of complaint as Exhibits One (1), two (2) and three (3), which said orders undertake to make a new tariff for the transportation of logs in carload lots to the City of Alpena over the Detroit & Mackinac Railway Company, other than the ones now in force and effect on said complainant's railroad, until the further order of this Court.

Witness, the Honorable George S. Hosmer, Circuit Judge, and the seal of said Circuit Court at Detroit, Michigan, this 24th day of November, A. D. 1909.

THOMAS F. FARRELL,
Register.
By GEORGE HUMBERT,
Deputy Register.

JAMES McNAMARA,
Solicitor for Complainant,
1233 *Majestic Building, Detroit, Michigan.*

STATE OF MICHIGAN:
County of Ingham, ss.

I hereby certify and return that on the second day of December, A. D. 1909, at the City of Lansing, I served the within Writ of In-

junction on Samuel H. Kelley, secretary of the Michigan Railroad Commission, named therein, personally, by then and there showing to the said Samuel H. Kelley, Secretary of the Michigan Railroad Commission, the said injunction, with the seal impressed
411 thereon, and delivered to him a true copy thereof.

O. L. LATHROP,
Deputy Sheriff for Ingham Co.

My fees, $2.50.

EXHIBIT 1 P.

Stipulation of December 2, 1909.

(Title of Court and Cause).

It is hereby stipulated by and between the attorneys for the respective parties hereto, that the application for an injunction and the order to show cause made by said Court, and the hearing thereon, may be and is hereby continued in its present state, until the final determination of said cause upon the merits thereof.

JOHN E. BIRD,
Attorney General.

Dated this 2nd day of December, A. D. 1909.

JAMES M. McNAMARA,
Solicitor for Complainant.

EXHIBIT 1 Q.

Petition of Fletcher Paper Company for Leave to Intervene as Defendant. Dated January 29, 1910.

Recites previous proceedings and reasons for desired intervention.

EXHIBIT 1 R.

Petition of Frank W. Gilchrist, Churchill Lumber Company
412 *and Island Mill Lumber Company for Leave to Intervene as Defendant. Dated January 20, 1910.*

Recites previous proceedings and reasons for desired intervention.

EXHIBIT 1 S.

Order granting leave to petitioners in Exhibits 1-Q and 1-R to intervene as defendants. Dated February 3, 1910.

EXHIBIT 1 T.

Answer of Michigan Railroad Commission to Bill of Complaint.

Many allegations of fact denied. Denies (among other things) that its orders, if put into operation, would injure or destroy com-

plainant's property rights or interests. Also denies that such orders were contrary to complainant's legal rights, and denies that complainant is entitled to the relief prayed for.

EXHIBIT 1 U.

Answer of Fletcher Paper Company. Dated February 4, 1910.

Contains the same denials and many others.

EXHIBIT 1 V.

Answer of F. W. Gilchrist, Churchill Lumber Co. and Island Mill Lumber Company, dated February 5, 1910.

Contains the same denials and many others.

413 EXHIBIT 1 W.

Certificate of Circuit Judge.

Referring evidence back to Railroad Commission in pursuance of Par. C, Sec. 26, Act No. 200 of 1909.

EXHIBIT 1 X.

Opinion of Michigan Railroad Commission. Dated November 15, 1909.

To the Circuit Court for the County of Wayne, in Chancery:

A copy of the evidence taken in the above-entitled cause having been transmitted to this defendant, the Michigan Railroad Commission, under and pursuant to Section 26, Subdivision "C," Act 300, Public Acts of 1909, for its consideration, as required by law, this defendant, the Michigan Railroad Commission, begs leave to repeat as follows:

First. The bill of complaint was filed in this cause for the purpose of vacating three orders made by the Michigan Railroad Commission, bearing date October 22nd, November 3rd and October 19th, 1909, respectively, and certified copies of which are attached to said bill of complaint and marked Exhibits 1, 2 and 3, and which said orders were made after a formal hearing before this defendant upon proper complaints thereto.

Second. This defendant, the Michigan Railroad Commission, has carefully considered the testimony in said cause, and copy of which was transmitted to it, as aforesaid, and in addition thereto and in connection therewith, has made a thorough inspection of all the branch roads of said complainant, the Detroit & Mackinac Railway
414 Company, affected by said orders, the method of transporting forest products thereon and the attending conditions and

circumstances incident to the transporting of forest products therefrom to the city of Alpena and intermediate points; and also the transporting of manufactured products from the city of Alpena to various points on the line of the Detroit & Mackinac Railway Company and its connections.

Third. That after a careful consideration of such evidence and the investigations made by this defendant, the Michigan Railroad Commission, in connection therewith, as aforesaid, and the many facts and circumstances, including the character of the service required and the expense incident thereto, it is the opinion and judgment of this defendant, the Michigan Railroad Commission, that the three orders complained of should not be rescinded, altered, modified or amended in any particular.

Fourth. That it is the opinion of this defendant, the Michigan Railroad Commission, that the evidence introduced in behalf of complainant, respecting the cost of operation, should not be taken as in any manner conclusive for the reason that it admittedly relates to a subject with respect to which there is no known definite method of computation, which fact clearly appears from the evidence submitted in said cause.

Fifth. That this defendant, the Michigan Railroad Commission, further reports that it has on file the annual report of the complainant, the Detroit & Mackinac Railway Company, for the year ending June 30, 1910 showing a net earning of (8 7-10 per cent) eight and seven-tenths per cent on the value of its road, as shown by its verified amended bill, which said report was filed with the Michigan Railroad Commission on the 17th day of October,
415 1910, a certified copy of which is hereto attached and made a part of this report, all of which is

Respectfully submitted,

MICHIGAN RAILROAD COMMISSION,
By C. L. GLASGOW, *Commissioner.*
By JAMES SCULLY, *Commissioner.*

Dated this 15th day of November, A. D. 1910.

Exhibit 1 Y.

Opinion of Circuit Judge.

The Detroit & Mackinac Railway Company is a railroad corporation organized under the laws of this state, and operating a railroad with small branches from Bay City north through Alpena to Cheboygan. It is the complainant in this proceeding. The Michigan Railroad Commission is the defendant in this proceeding, and is the commission created by virtue of Act No. 300 of the Public Acts of 1909. Several individuals and corporations claiming to be interested in the outcome of this litigation have intervened on behalf of the complainant and certain others on behalf of the defendant.

Complainant company between Alpena and Cheboygan has a

number of small branches which it designates as "stems," from which "stems" there are further extensions generally known as logging branches. It is not in serious controversy but that when a timber owner in the past has desired to market his timber holdings, an arrangement has been made with the complainant company whereby the timber owner furnishes and grades a right-of-way, furnishes ties,
and thereafter the Railway Company with that beginning
416 constructs a logging branch, having for its primary object
the bringing to market of the timber adjacent to this branch as rapidly as it is felled.

In general the country through which the complainant company operates is very sparsely settled. At one time farther south on its line it did a large business in bringing to market pine. A very substantial proportion (the record indicates fifty-two per cent) of its present freight business is still in forest products, but its timber operations are largely confined to hemlock and hardwoods.

One of the intervening defendants most actively interested in this litigation is the Fletcher Paper Company. This company operates a paper mill at Alpena, a place formerly called Broadwell's Dam, now known as Fletcher's Dam. This place is located about three miles north from Alpena on the main line and on a spur track, about two miles off the main line. This defendant uses in its business principally hemlock, but not of the better grade, for it uses such wood as it does at Fletcher's Dam for the purpose of grinding it into pulp. For upwards of twelve years, there has been in operation between the intervening defendant, the Fletcher Paper Company, and the Complainant Railway Company, a switching rate of two dollars per car for a complete movement from Alpena to Fletcher's Dam.

Other of the intervening defendants have for some time past been engaged in general lumbering business in and about Alpena. The cost of bringing their forest products from the timber tract to the market or mill has varied from time to time, but for a considerable
period of time prior to the beginning of the difficulties which
417 gave rise to this lawsuit, there was one rate upon hemlock
and another rate upon pine and hardwoods, and while this condition existed the shipper claimed to be handicapped by two things:

(*a*) It was necessary to load on one car only one type of timber.

(*b*) If it was not practicable to do this and a mixed car was brought to the market or mill, the rate charged was the highest rate.

Because of this condition on February 12, 1907, Mr. Kimball of the Churchill Lumber Company, one of the intervening defendants, suggested to the complainant railway, by letter, the situation as it then existed, and proposed that the rate be changed so as to make a flat rate upon all classes of logs. Thereafter, at Alpena, in November, 1908, a conference was had been certain of the officers of the complainant company and certain interested timber men in and about Alpena. It is claimed that at that conference a flat rate on mixed logs of $3.00 per thousand feet with a minimum of 2,500 feet per car, so far as that rate affected some of the interested parties was

concerned, should be fixed. As a result of the conference, however, this rate was fixed at about twenty-five cents per thousand feet more than the shippers had proposed, and on January 20, 1909, the tariff much referred to in this litigation as M. R. C. No. 205 was filed with the Railroad Commission to become effective February 1, 1909. This tariff contemplated, because of water competition at Alpena, that any shippers of logs who shipped out their finished product via the complainant company, should receive a refund of fifty cents per thousand feet when an equal amount of the manufactured product was so shipped. This tariff was confined entirely to logs in
418 carload lots shipped into Alpena where there was water competition. Thereafter and on February 8, 1909, there was filed with the Railroad Commission what is known as M. R. C. 208, which was a local tariff upon bolts and logs between other stations upon the complainant road, which tariff was based entirely upon the tons per mile basis, as distinquished from M. R. C. 205. This tariff was to take effect February 20, 1909.

The motives which prompted the subsequent proceedings are easily understood, but not necessarily material to a determination of any of the issues involved. Four complaints were lodged with the defendant Michigan Railroad Commission, as follows:

On February 23rd the Fletcher Paper Company in due form charged the complainant railway with discriminating in the making of rates on lumber products; with having made rates without uniformity for the length of the haul, and with granting on some Alpena rates a fifty cent rebate, and finally with excessive charges.

On March 12th, the Fletcher Paper Company filed another complaint in which the complainant railway (hereinafter called the Railway Company) was charged with discrimination in the making of rates on lumber products; with making rates without uniformity for the length of haul; with giving a fifty cent rebate on some Alpena rates, and with making excessive charges.

On April 20th, the Fletcher Paper Company filed another complaint against the Railway Company, charging that it had raised the rates on both logs and switching (there were other charges made, not afterwards referred to, and not material to any of the issues involved in this case).

419 On April 26th, the intervening defendants F. W. Gilchrist, the Churchill Lumber Company and the Island Mill Lumber Company, filed another complaint against the Railway Company, in which it was charged with making higher rates for the transportation of logs in carload lots to Alpena than was charged for relative distances to Cheboygan, and also in which the further charge was made that the published rates to Alpena were unjust and unduly discriminatory.

The second complaint just referred to was never passed upon by the defendant Commission, unless its findings, which it filed jointly on the other three complaints may be so regarded. The occasion for the complaint of the Fletcher Paper Company relative to switching charges arose by reason of the fact that shortly prior to this time the Railway Company, which, as already pointed out, had for a long

period of years charged two dollars as a switching charge to Fletcher's Dam, had raised that rate to five dollars. After the filing of the complaint charging a discrimination between Alpena and Cheboygan, and before a hearing upon any of these complaints, a new tariff for Cheboygan was filed, and the occasion for that branch of these complaints, prima facie at least, eliminated. After a hearing, at which all parties were present and represented, and on, to-wit, the 19th day of October, 1909, the defendant Railway Commission made its findings upon these complaints as before outlined. That portion of those findings to which reference has been had during this litigation are three in number:

(1) They provided that the rate to Fletcher's Dam on any shipment from either the north or south should be the same as the rate to Alpena.

420 (2) They provided that the switching charge from Alpena to Fletcher's Dam should be $3.50 per car.

(3) They set aside M. R. C. 205, the flat rate on mixed logs into Alpena, and substituted in its place substantially M. R. C. 208, which is the per ton mile basis not intended originally by the Railroad Company to apply to Alpena, because of water competition at that point, although they authorized by their finding the fifty cent rebate to those shipping out the finished product over the lines of the railway, and in a supplemental order they fixed a minimum of 2,500 feet per carload.

Because these orders confessedly worked a substantial reduction in the income of the Railway Company, following the statute already referred to, Section 26A, the Railway Company filed its bill in this court against the Railroad Commission, and sought an injunction to restrain putting these orders into effect. That is the proceeding before the court for determination. An examination of the pleadings and the briefs of counsel, together with a recollection of the oral argument, indicates that no complaint is now made as to that portion of the Commission's orders fixing the rate to Fletcher's Dam as the same rate to Alpena; so that the question now before the court is this: Is the order of the Commission fixing a $3.50 switching charge from Alpena to Fletcher's Dam and fixing the rate on logs as already outlined, unlawful or unreasonable, within the meaning of the Act giving rise to these proceedings?

It should be remarked that the proceedings contemplated by the statute in question have thus far been followed. After the first orders of the Commission on the subjects involved in this case had been made, the bill of complaint was seasonably made. After

421 proofs had been taken, the record was certified to the Commission, because new and additional testimony had been placed before the court. The Commission having declined to change their previous orders the case was then under the statute presented to the court for determination.

As frequently happens in matters which are seriously litigated, there are certain preliminary questions presented to the court for determination.

(1) After the complaint alleging a discrimination between

Alpena and Cheboygan had been filed, a new rate for Cheboygan was filed before any hearing was had upon the complaint. Doth this circumstance oust the Commission of jurisdiction to proceed?

(2) It is urged that so far as the rate on logs is concerned, it affects entirely a product the haul of which originates upon a logging branch, as previously described. And these branches, it is further claimed, are not subject to the jurisdiction of the Railroad Commission.

If these two preliminary contentions are disposed of adverse to the claims of the Railway Company, the remaining problem before the court is this:

Are the two orders of the Commission (the one fixing a $3.50 switching charge from Alpena to Fletcher's Dam, the other fixing a ton per mile rate upon logs in carload lots, rather than M. R. C. 205) unlawful or unreasonable?

A solution of this question involves a consideration of these two questions:

(*a*) The power of the court in the premises; and

(*b*) The duty of the court under the circumstances.

Does the fact that after complaint was made based upon an alleged discrimination between Alpena and Cheboygan, the occa-
422 sion for this discrimination was removed, oust the Commission from further jurisdiction so that they had no power to proceed? Obviously if the Commission lost jurisidiction because of this circumstance, this court has no serious problem to consider on that branch of the case. It is significant, and a fact that should be borne in mind, that under appropriate circumstances, the Commission itself may inaugurate proceedings without complaints, if they believe that any rate or charges are unreasonable (Section 22 C of the Act). And it has been suggested that because all parties were present and heard that jurisdiction can be sustained because of the power of the Commission itself to inaugurate these proceedings. However, it is unnecessary to decide the question present upon this theory. Four different complaints appear to have been made, and three of them were passed upon. The question of the logging rates, which is the serious problem in this controversy, was involved in the first Fletcher complaint and in the so-called joint complaint. All of these complaints were treated by the Commission as one case and heard as such. It is quite clear, therefore, that although the occasion for dissatisfaction over an alleged discrimination may have been removed, there was before the Commission, by virtue of two complaints at least, the question as to the reasonableness of the existing rates.

Does the Railroad Commission Act apply to a rate such as is in controversy here, where the point of shipment originates upon a logging branch? This record indicates that on these logging branches, the timber-owner owns the right-of-way. That in the first instance he does the grading and furnishes the ties for use on this right-of-way. In some cases he has charged other tim-
423 bermen fifty cents a thousand feet for bringing their timber out over this right-of-way. Little if any business is done ex-

cept the business of the operator for whose benefit the branch was first put in, although the Railway Company in its tariffs and in its advertisements solicits business over those branches. No passenger trains are ever run over the branches, and no freight train schedule is ever maintained over these branches. There are practically no farms or settlers contiguous thereto. Frequently, though not uniformly, as soon as the timber operations adjacent to the branch have been completed, the rails are taken up from the branch and the place abandoned. No survey for a right-of-way, together with accompanying maps, appears ever to have been filed in connection with their construction. The railroad has never assumed to condemn a right-of-way, because in all cases the right-of-way is owned and furnished by the timber owner. The railway charges the cost of the construction of these branches to operating expenses rather than to construction account, and in the operation and maintenance of these branches, when once constructed, the railway has a complete monopoly and is in supreme control. The length of haul to Alpena depends, of course, upon the location of the branch in each case, and varies on the main line or stems of the road from a short distance to sixty miles and upward, and upon the logging branch proper, from a short distance to upwards of twelve miles. So it will be seen that the major portion of the haul for which the tariff in dispute is made is not upon the logging branch.

In considering this question, certain significant sections of the act under consideration should be borne in mind. A common carrier is defined as embracing all corporations who now operate, man-
424 age or control any railroad or part of any railroad (Section 3-A). The term "transportation" is defined as including the instrumentalities and facilities of shipment and all service in connection with switching of property transported (Section 3-B.) The term "railroad" is held to include all railroads, no matter what their motive power, except "The provisions of this Act shall not apply to any logging or private railroad, not doing business as a common carrier" (Section 3-C). The provisions of the act are made to apply to the switching of property (Section 3-D). The Commission is expressly given control over private sidetracks, so far as the same are used by common carriers (Section 14). The Railway Company insist that the following authorities sustain the contention that shipments such as are involved in the tariff under discussion are not subject to regulation by the Commission.

Mann vs. Pere Marquette, 135 Mich. 210.
Pere Marquette R. R. vs. U. S. Gypsum Co., 154 Mich. 290.
Hench vs. Britt, 62 W. Va. 270.
Scott Lumber Co. vs. Walford, 62 W. Va. 555.
Pozard vs. The Kanawha Company, 139 N. C. 283.
Healy Lumber Co. vs. Morris, 33 Wash. 490.
Berrien Springs Water Co. vs. Circuit Judge, 133 Mich. 48.

An examination and anaylsis of the last six cases cited shows that they held in substance merely that private property cannot be con-

demned for a private use, a question obviously not involved
425 here. In the case of Mann vs. Pere Marquette, the court held that because a railroad was under no legal obligation to put in a sidetrack, it became competent to contract, in case such a track was put in, against the statutory liability for fire originating from railroad property. That decision, however, can be of little assistance in this connection if the language of the Railway Commission Act is to be given by the court that construction to which it is clearly entitled. If the Commission has supervision over private sidetracks operated by a common carrier, has jurisdiction over corporations operating as common carriers and has jurisdiction over switching charges, it would seem that the Commission was clearly within its rights in undertaking to fix some logging rate as they did. The proviso in Section 3-C was obviously meant to apply, as its language clearly states, "To any logging or other private railroad not doing business as a common carrier." It is a well known fact that such railroads are common, perhaps formerly more so in this State than now, but can it be said on this record that the D. & M. Railroad is a private railroad not doing business as a common carrier? It has been held, even in the absence of such definitions as are found in our law, that "To constitute a common carrier, it is not essential that the person or corporation undertaking such service own the means of transportation. If the contract is that the goods will be carried and delivered, it makes the one so contracting a common carrier, regardless of the name or the ownership of the line or lines over which the service extends."

Cownie Glove Co. vs. Merchants Despatch, 130 Iowa, 327.
426 See also the Railway Commission vs. Railway Company, 111 La. Ann., 133.

It will be observed that every apparent effort has been made by the Legislature to include every form of railroad operation in the Railroad Commission Act. If it had been desired to exclude from its operation shipments such as are involved in this case, it would have been a simple matter indeed to have said so. Instead of that, the Act clearly indicates an intention to include such shipments. Peculiarly does the Act indicate this where it excepts logging or other private railroads, not doing business as common carriers. It would be a forced construction indeed, and clearly contrary to the spirit and letter of our laws, and of this Act, to hold that a case of this description was not contemplated.

Having thus found that the Court has jurisdiction, the problem for determination is as to the power and duty of the Court in the premises.

(1) Does the Court investigate the question as to whether or not the rates giving rise to the original complaint were unreasonable and therefore susceptible of adjustment by the Commission?

(2) Does the Court investigate the question as to whether or not the new rates as fixed by the Commission are unreasonable and unlawful, and thereafter fix reasonable and lawful rates; or

(3) Does the Court investigate the question as to whether the

rates as fixed by the Commission are unreasonable and unlawful, and if so found, set them aside, thus restoring the old rates?

The language of the Act provides in substance that any party in interest being dissatisfied with an order of the Commission, may commence an action in the Circuit Court in Chancery, "To
427 vacate and set aside any such order on the ground that the rate or rates * * * fixed are unlawful or unreasonable."

The history of legislation upon this subject and of judicial decisions in connection therewith constitutes a most interesting and instructive study. Its complete review would, of course, lengthen an opinion beyond the bounds of reason, and, in view of the list of authoritative decisions upon the subject, it should be unnecessary. It is enough to say that the courts themselves have apparently at all times kept pace with modern economics though in connection with this intricate question. The few later authorities hereafter cited establish beyond question the following propositions:

(1) Rate making is peculiarly a legislative rather than a judicial function.

(2) Under appropriate circumstances, the Legislature may delegate its power to a Commission constituted for that purpose.

(3) Legislative action on the subject is at all times subject to judicial review.

(4) Courts may not make rates, the limit of judicial authority being to inquire whether or not the rates as fixed are so unreasonable as to be confiscatory.

(5) As in all cases where a legislative enactment is attacked, the presumption of the validity of the enactment is very strong, and judicial interference should never occur unless the case presents clearly and beyond all doubt such a flagrant attack upon the rights of property as to compel the court to say that the rates prescribed will necessarily have the effect of denying just compensation for private property taken for the public use. (Our statute specifically places the burden of proof upon the complain-
428 ant. 26 E.

(6) Each case presented depends for its determination upon the particular facts and circumstances therein involved.

(7) Among the great many facts and circumstances to be considered by a court, a few of the more prominent are as follows:

(*a*) The interest of the public in the subject matter.

(*b*) The interest of the particular shipper or shippers affected by the rate in question.

(*c*) The character of the commodity.

(*d*) The cost to the railway of the service.

(*e*) The character and location of the railway, as affected by topography, geography and population of the country traversed.

(*f*) The amount of inter and intra state earnings and the effect upon either or both, of the rate fixed.

(*g*) The real value of the railway property, as distinguished from its capitalization or the amount of its bonded debt.

(*h*) Its legitimate, proper and necessary disbursements.

(*i*) What in the light of all the circumstances, would be a fair return upon the capital actually invested.

The foregoing difficult and intricate items, with other circumstances at different times, are all essential factors for the court to consider, but no one of them may with any degree of propriety be regarded, standing alone, as the determining factor in the solution of the ultimate question in each case. That question is, Will the rate complained of so seriously affect the railroad as to amount to a deprivation of its property, without adequate compensa-
429 tion or due process of law?

Regan vs. Trust Company, 154 U. S. 362.
Smith vs. Ames, 169 U. S. 466.
Knoxville vs. Water Co. 212 U. S. 1.
Steenerson vs. Railway Company, 72 N. W. 713.
Spring Valley Wks. vs. San Francisco, 124 Fed. 754.
Palatka Water Wks. vs. The City, 127 Fed. 161. Wilcox vs. Consolidated Gas Co., 212 U. S. 19.
Wellman vs. Chicago & Gd. Trundk Ry. 83 Mich. 592, 143 U. S. 339.
Smith vs. Lake Shore Ry. Co., 114 Mich. 460.
M. C. R. R. vs. Circuit Judge, 156 Mich. 459.

With these observations in mind, what is the valuation of the Railway Company? Obviously this question must be determined upon this record, for no court, in the absence of proof on the subject, would be competent to reach a conclusion. The property is assessed by the State Board at the sum of $4,585,000. In the sworn bill of complaint is a recitation to the effect that the property is worth $4,500,000, and upwards. In the amended bill of complaint, which was likewise verified, the property is alleged to be of the value of $4,585,000, and that the cost of reproducing the same would equal said sum. About three years ago, in the report of the president to his stockholders, he complained that the property, at that time assessed for a little less than now, was assessed at nearly double its value. In his testimony before the Court, he estimates the property to be worth from five to six million dollars, and
430 places his figures at eight million dollars in all, including good will and franchises. The Court is but human and cannot but recognize the obvious embarrassment of the Railway Company when, for the purposes of taxation it is sincerely desired to have a low valuation, and for the purpose of this litigation it is equally earnestly desired that the valuation be high. Upon this record it becomes unnecessary to judicially determine those vexed questions as to how the Court shall be guided, whether by cost price, reproduction price or estimated present price, or whether franchises and good will should with propriety be included, although the later authorities seem to indicate that, if possible, the Court shall determine the amount of money honestly and properly invested in the enterprise being considered. In the light of the situation, sub-

stantial justice will be done all parties if the Court finds the valuation of this Railway to be five million dollars.

The next logical inquiry would be to determine how much will the earnings of the Railroad be affected by the rates fixed by the Commission. The annual report for the last year of this company shows the net revenue, deducting taxes paid for the preceding year, to have been $295,329.53. There is no claim on this record by any of the interested parties but that the disbursements which have been charged against the gross earnings have been reasonable, proper and necessary, so that this sum may be definitely regarded with entire propriety as the basis for further computation.

The Railroad claims that for the year 1909, its net revenue on logs if paid for at the rate for which it contends would be $85,865.10; that at the rate fixed by the Commission the company would net from the same business $51,132.45, a difference
431 of $34,732.65. In reaching this conclusion, however, it is undisputed but that on the one hand the tariff has been fixed at the maximum which the railroad can charge, that is to say, no consideration has been taken by the company in reaching its larger figures, of the fact that on some of the shipments a rebate of fifty cents per thousand would be granted where the finished product had been shipped out over the road, while on its smaller figures, the railroad has assumed that this rebate would be granted to every shipper. The testimony indicates clearly that at least eighty per cent of the total freight of this description never is allowed the fifty cent rebate, because of the fact that the reshipment of the finished product is by water. It is obvious from this that the loss claimed by the company is too large. The Commission by an equally erroneous process of figuring, reaches the conclusion that the loss on this branch of the case to the railroad would be $21,691.05. Manifestly to figure this exactly is most difficult, if not impossible, but under the circumstances, a loss of $30,000 would not be far out of the way.

As to the loss of the company because of the decrease in the switching charge from Alpena to Fletcher's Dam of $1.50 per car, it is likewise in conflict, especially as it is claimed by the Railway Company that the cars now used are cars with a capacity of sixty thousand pounds, where years ago the car capacity was forty thousand pounds. However, the loss in any event is but a few hundred dollars. The cost of the service is difficult, if not impossible, to ascertain. So far as the logging operations are concerned, they will probably be substantially at an end upon all of the present lines of the road within five years.

432 It is obvious from the previous reasoning in this opinion, that the Court cannot view or determine these questions involved as though sitting as a railroad commission. It must approach its determination having in view at all times the settled rules of the law regardless of the peculiar equities attaching to the case. As there are two orders now being complained of before the Court, they will be regarded separately. So far as concerns the switching charge to Fletcher's Dam, it needs no reasoning to demonstrate

that while the rate fixed by the Commission will in a small degree reduce the earnings of the Railroad Company yet it cannot be said to be confiscatory in its nature. The courts have gone so far as to hold that even though certain commodities be carried at a loss, or a certain service rendered at a loss, that was not ground for judicial interference with a legislative function, so long as the road earned enough on other business to yield a fair return on the investment. The bill will therefore be dismissed as to that order.

The order setting aside M. R. C. 205 is not so easy of disposition. The court is compelled to determine whether a loss of about $30,000 per annum for the next five years will amount to a confiscation of the property of this railroad. With a valuation of five million dollars, it earned last year 5 9-10 per cent. Had the rates complained of been in effect, it would have earned 5 3-10 per cent. Confessedly a decrease in earnings of $30,000 per annum, which is more than ten per cent of its entire earnings, is a most serious matter, and presumably was given serious and thoughtful consideration by the Railway Commission when it took the confessedly drastic step that it did. But can the court say that these rates as fixed
433 by the Commission, "Are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just, both to the owner and the public * * * such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use?"

San Diego Land Co. vs. National City, supra.

Can the court say that this situation will "Work a practical destruction to the rights of property?"

Regan vs. Farmers' Loan & Trust Co., supra.

Can the court say that this rate is "So unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures?"

Smith vs. Ames, supra.

The query when put in language extracted from the opinions of the highest court in this land practically answers itself. At no time in any decision has any court assumed to say what return on capital is essential to avoid a regulation being charged with confiscation and probably no court can or will assume so to do. Each case is peculiar unto itself. It has been urged in the case at bar that because a real estate loan in Alpena brings seven per cent, that this company should be entitled to earn seven per cent on its investment. The court will take judicial notice of the fact that railroads are few that earn any such amount and the average earnings of roads of this description throughout the United States is a very much smaller per cent indeed. It should be borne in mind in this case, that be-

cause of the character of the business involved, the road will
434 only be seriously affected by this rate for about five more years. Judicial interference should never occur unless the case presents clearly beyond all doubt such a flagrant attack upon the rights of property, under the guise of regulation, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property for the public use.

San Diego vs. National City, supra.

While undoubtedly the rates prescribed by the Commission seriously affect the railroad, the effect is not of the class that permits the court to afford relief. Counsel for the Company in his very able brief points out with much force the effect of recent state regulation upon the earning power of this railroad, the large taxes paid, the two per cent fare law, the excess baggage law, and other matters of legislation and regulation which undoubtedly have proven sources in this particular instance of serious concern and were his brief before the court as a railroad commissioner rather than as a branch of the judiciary a different conclusion would be reached. But under the facts as they are disclosed by this record, and the authorities examined, the bill of complaint cannot be maintained.

A decree may therefore be entered dismissing the bill of complaint with the usual costs to be taxed.

The novelty, magnitude and difficulty of the questions involved afford ample apology for the length of this opinion. The court has been rendered invaluable aid, without which a proper consideration of this case would have been impossible, by the very able and exhaustive briefs and argument of all the counsel interested.

Any of the interested solicitors may forthwith prepare a de-
435 cree in accordance with this opinion.

J. O. MURFIN,
Circuit Judge.

EXHIBIT 1 Z.

Decree of Wayne Circuit Court.

Ordered, Adjudged, and Decreed, that the three several orders of the Michigan Railroad Commission, copies of which are attached to the original bill of complaint as Exhibit 1, dated October 19, made on the petition of Fletcher Paper Company; one dated October 19, 1909, made on the petition of F. W. Gilchrist, Churchill Lumber Company and Island Mill Lumber Company, and a supplemental order dated November 3rd, 1909, be and the same are severally affirmed; and it is further

Ordered, Adjudged and Decreed, that the bill of complaint as well as the amended bill of complaint filed in this cause be and the same are hereby dismissed with costs to be taxed.

Ordered, Adjudged and Decreed, that the bill of complaint as well as the amended bill of complaint filed in this cause be and the same are hereby dismissed with costs to be taxed.

Ex. "5".

J. O. MURFIN,
Circuit Judge.

436 EXHIBIT 1 AA.

Complainant's Motion for Rehearing, Also Proceedings Thereon, Feb'y 11, 1911.

Complainant's Motion for Rehearing.

STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne, in Chancery.

DETROIT & MACKINAC RAILWAY COMPANY, Complainant; THE Onaway Shingle & Tie Co., S. H. McTiver, W. Johnson, Fitzpatrick R. Williams, R. P. Holihan, Gardner Peterson & Co., D. A. Stratton, R. Mitchell, Hill & Lawler, Mathew Heslip, Wilson Pines & Sons, Robinson & Stevens, Albert Selke, N. G. Stevens and J. W. Updegraph, Intervening Complainants,

vs.

MICHIGAN RAILROAD COMMISSION, Defendant; THE FLETCHER Paper Co., Frank W. Gilchrist, Churchill Lumber Co., and the Island Mill Lumber Co., Intervening Defendants.

And now comes the complainant and the intervening complainants by their respective solicitors and counsel and move the court to grant a re-hearing in this cause, and to grant and enter a decree setting aside and vacating the order of the Michigan Railroad
437 Commission of October 23, 1909.

This motion is based on the following reasons:

1. There was no complaint by any party, nor any charge preferred by the commission itself on which the commision could lawfully make the order of October 23, 1909, that is to say, the allegation or charge essential to due process of law was wholly wanting.

2. The hearings and investigations on the complaints that were before the commission, did not disclose any fact or facts justifying or warranting the order of October 23, 1909, which was without facts to support it, it being the result of guesswork on the part of the commission.

3. The court erred in ruling that the Michigan Railroad Commission has legislative authority to fix rates, and that the courts have no power to review the orders of the commission except when they are actually confiscatory, and this under the statutory requirement that the burden of proof in on the railroad company with all possible doubts resolved against it.

4. The court erred in holding that the Detroit & Mackinac Railroad Company is a common carrier on the logging branches and subject to the jurisdiction of the Michigan Railroad Commission.

5. The court erred in ignoring the evidence introduced by the

complainant that the rates fixed by the commission would compel the company to haul logs for less than the cost of that service.

6. The court erred in taking *rate* consideration an alleged report about three years ago of the President of the Detroit & Mackinac Railway Company to his stockholders, "in which he complained that the property, at that time assessed, for a little less than
438 now, was assessed at double its value," which report was not in evidence or in any way before the court, and the railroad company thereby being prevented from explaining the same as it might have done by showing that in making valuations for the purpose of taxation, the general practice in Michigan is to assess the property at fifty per cent of its actual cash value.

8. The court erred in finding that the net earnings of the road for the year ending June 20th, 1910, were $295,329.53 when they were only $278,206.03.

9. The court erred in finding that the loss the company would sustain under the rates fixed by the commission would only be $30,000.00 per annum when it would be $34,733.35 and upwards.

10. The court erred in holding that the cost of the switching service from Alpena to Fletcher's Dam is difficult if not impossible to ascertain, thereby permitting the railroad commission to make an arbitrary and despotic rate, wholly without facts to support it, and at the same time to deny to the railroad company the right to show by competent railroad men, with approximate and reasonable certainty, what the actual cost of that service is.

11. The court erred in taking judicial notice of the alleged fact "that railroads are few that earn any such amount," seven per cent, and that "the average earnings of roads of this description throughout the United States is a very much smaller per cent indeed."

12. The court erred in holding that the fact that the logging business of the Detroit & Mackinac Railroad "will probably be substantially *of* an end upon all of the present lines of the railroad within five years," and therefore, "the road will only be
439 seriously affected by this rate for about five years," is a good reason why the rates of the railroad commission should be sustained, whereas in fact and in law, it is a conclusive reason why the higher rates of the railroad company should be sustained.

13. The act of the state legislature defining and regulating common carriers and creating the Michigan Railroad Commission as said act is construed and enforced by the court, and the order of the railroad commission of October 23, 1909, and the proposed decree of the court, is a deprivation of property without due process of law, and a denial of the equal protection of the laws, within the meaning of the Fourteenth Amendment of the Constitution of the United States, in this that the Detroit & Mackinac Railway Company has not had the full benefit of a full hearing upon the facts of the case, either before the railroad commission or the court, and the right to a judicial review of the order of the commission has been denied.

14. The order of the railroad commission and the proposed decree of the court are a violation of the Fourteenth Amendment because the rates fixed by the commission are actually confiscatory as

shown by the undisputed and uncontradicted evidence in this case.

15. The court erred in granting a decree dismissing the bill.

JAMES McNAMARA,
Solicitor for Complainant.
FRED A. BAKER,
Solicitor for Intervening Complainant.

On the presentation of the above motion the following occurred:

Mr. Baker: The primary purpose of making this motion
440 is to put upon the record an objection to the decree of the court. The way you construe and enforce this statute it violates the Constitution of the United States, and in order to get that upon the record in the trial court, as I am bound to do, under the decisions of the Supreme Court of the United States, we make this motion for rehearing. If it had not been for that, we probably would not have made one. I want to present that question to the court because I think when you consider the cases that bear upon the subject, you will set aside the decree; you will not grant the decree you have ordered.

The Court: I have studied this case very carefully before disposing of it. I do not wish to be at all abrupt in the matter, but in view of the fact that I am simply a nisi prius Court, in view of the fact that the Supreme Court of the United States will ultimately have to review this case, I do not believe I will hear your application. I will simply deny it as a matter of form, because I do not believe that a reconsideration of this case—I do not like to be stubborn about it—but I do not believe a reconsideration of this case would be profitable to anybody. Not that I am shirking the work, because I like it, not being a court of last resort, it does not seem to me that my conclusions, as a matter of fact, amount to anything except a gratification in my conscience in having done my duty the best I can, and, it seems to me, you will be better off if I deny your motion, and this is expedited rather than delayed by a reconsideration by the Court.

Mr. Baker: There is something to be said in favor of that. But, at the same time it is the duty I apprehend of the trial court to reopen the subject and dispose of the case according to the best judgment of the court.

441 The Court: Well, I have tried to do that.

(The court reads the motion.)

Mr. Baker: I claim the right to be heard here on this application for rehearing.

The Court: This is filed, Mr. Baker, and your record is preserved, and I will deny the application for rehearing. I will hear you gentlemen upon the proposed decree. If you have been able to agree upon it, I will be very much relieved.

The decree was then settled and signed.

EXHIBIT 2.

Printed Arguments for Complainants in Wayne Circuit Court.

Arguments of Messrs. James McNamara (64 pages) and Fred A. Baker (22 pages).

EXHIBIT 3.

Brief of James McNamara for Complainant and Appellant Filed in Supreme Court of Michigan on Hearing of Case Reported in 171 Michigan 335.

1. How the controversy arose.
2. Is the switching rate of $5.00 per car to Fletcher's Dam unreasonable and excessive?
3. Is the rate established by M. R. C. 205, unjust and unduly discriminatory?
4. Are the logging branches under the jurisdiction of the Michigan Railroad Commision?
5. The decrease of revenue under the Commission rates is so great as to be practically confiscatory.
6. The Michigan Railroad Commission act and the "in-
442 vestigation" of the body upon which its orders are based.

EXHIBIT 4.

Brief of Fred A. Baker for Intervening Complainants and Appellants in Same Case.

This brief discussed the following contentions (among others):
1. That the Railroad Commission had no jurisdiction over the logging branches.
2. That the Circuit Judge erred in holding that he had no power to set aside the Commission rates unless they were actually confiscatory.
3. That the statute as construed and enforced was in conflict with the 14th amendment to the federal constitution.
4. That the Circuit Judge "erred in holding that 5 3-10 per cent on a valuation of $5,000,000 was as much as complainant was entitled to earn."
5. That even if the Commission rates would not seriously impair the railroad company's earnings, yet it cannot be compelled to haul the logs for less than actual cost and a fair profit.
6. That there was no "undue or unreasonable preference."

Exhibit 5.

Brief of Franz C. Kuhn, Attorney General of Michigan, for Michigan Railroad Commission In Same Case.

This brief discussed the followings questions among others):

443 1. Is the railroad company a common carrier on its logging branches?
2. The courts have no authority to establish rates.
3. Burden of proof.
4. Would the enforcement of the Commission's orders be confiscatory?

Exhibit 6.

Brief of Gillett & Clark for Intervening Defendants In Same Case.

This brief discussed the following questions (among others):
1. The powers of the Commission and the Courts.
2. The jurisdiction of the Commission over the logging branches.
3. Would the enforcement of the Commission's orders result in confiscation?
4. The validity of the order reducing the switching charge to Fletcher's Dam.
5. The total effect of all the orders combined.
6. M. R. C. 205 excessive, illegal and discriminatory.
7. M. R. C. 217 excessive, unreasonable, discriminatory and in violation of contract.
8. The discontinuance of Fletcher's Dam as a receiving station.

Exhibit 7.

Opinion of Supreme Court of Michigan, July 22, 1912.

Reported in 171 Mich. 335.

444 EXHIBIT 8.

Printed Record Filed in the Supreme Court of the United States in the Case Reported in 235 U. S. 402.

The following parts of Exhibit 8 were separately marked and offered, viz:

EXHIBIT 8 A.

Decree of Supreme Court of Michigan in "Rate Case" Dated July 29, 1912.

Affirming decree of Wayne Circuit Court in chancery.

EXHIBIT 8 B.

Bill of Complaint. Filed August 17, 1912.

Par. 1. Complainant a railroad corporation, etc.

Par. 2. Jurisdiction invoked under 14th amendment.

Par. 3. Railroad subject to jurisdiction of Mich. Railroad Commission.

Par. 4. Railroad Commission on Oct. 22, 1909, and November 3, 1909, made certain orders reducing log rates for transportation of logs from "private logging tramways."

Par. 5. Proceedings to review orders. Decree affirming orders, affirmed by Michigan Supreme Court.

Par. 6. In the proceedings so had before the Railroad Commission, the Circuit Court, and the Supreme Court, complainant "contended and showed by clear, uncontradicted and conclusive evidence."

(1.) Logging roads private, and not subject to jurisdic-
445 tion of Commission. Orders deprived complainant of property without due process of law, in violation of 14th amendment.

(2) Rates locally unremunerative, unreasonable and confiscatory, in violation of the 14th amendment.

(3) Rates so impair general income as to violate 14th amendment.

Par. 7. Provisions of Michigan Statute in regard to burden of proof, are fair upon their face, but as construed by Commission, and Circuit and Supreme Courts (with an evil eye and a strong hand) are in conflict with the 14th amendment.

Par. 8. Complainant has exhausted remedies accorded by state laws. If it again applies to Commission, the rates fixed would immediately become operative, and complainant would sustain loss because many shippers not responsible. Complainant is entitled to injunctive relief for preservation of status quo, offers to furnish bond.

Per. 9. Organization of complainant and previous history of road.

Par. 10. History of extension of road. Statement of income and expenses for 1895 to 1912.

Par. 11. Although complainant has exercised great skill and efficiency in development, etc., and prudence and wisdom in management, it has never been able to earn a net profit of 6 per cent, except years ending June 30, 1904, and July 30, 1909. For year ending June 30, 1910, earned 5.9 per cent instead of 8.7 per cent as claimed by Commission.

Par. 12. Railroad worth $5,500,000, in 1909 after making proper deductions for depreciation, etc., and is now worth at least $6,000,000.

Property and equipment described. Railroad Commission
446 has never made inventory and appraisal and has ignored value.

Par. 13. Descriptions of logging roads (called "tramways") and their operation. Complainant did no business as a common carrier on such "tramways." Compensation for hauling logs thereon a matter of agreement.

Par. 14. Request made by Churchill Lumber Co.

Par. 15. Conference with Alpena lumbermen in November, 1908. Rates agreed upon and not complained of.

Par. 16. Fletcher Paper Co. Made complaint February 23, 1909, which was abandoned.

Par. 17. Gilchrist et al., made complaint on April 19, 1909, charging discrimination as compared with Cheboygan. Discrimination was abandoned but no other complaint filed. Commission made investigation with complying with Sub-section C of section 22 of the act and made orders complained of. The "action of the Commission without any complaint, charge or accusation" is in violation of the 14th amendment.

Par. 18. Railroad rates reasonable. Difference between M. R. C. 205 and 208 represents "tramway service." (A table is added giving the "tramway rates" which are arrived at by subtracting the "mileage rates" (M. R. C. 205) from the contract rates (M. R. C. 208).

Par. 19. Defendants claim that complainant has made "tramways" part of its public railroad, by publishing tariffs, etc. Complainant shows that it has never made any tariffs "specifically fixed rates for such service," but that its tariffs "always fixed rates for entire service on the tramways and the main line" combined. Same is true of rates made by contract. That in filing M. R. C. 205, complainant had no intention to affect the contract it had made
447 with the Alpena lumbermen, or to confer jurisdiction on the Commission, but deemed it prudent because the rates agreed upon included service on the main line. Complainant had no right and did not intend to impair a valid contract by filing its tariff.

Par. 20. Railroad no part of any trunk line. 35 per cent of income is derived from forest products which will soon be exhausted. Settlement of farming lands slow. Complainant is entitled to build up a sinking fund. Interest rate in Alpena and Presque Isle Counties is 7 per cent. Banks earn 12 per cent, and lumbermen and

manufacturers 20 per cent. Complainant is entitled to earn 10 per cent and any reduction of this is confiscation.

Par. 21. Competition at Alpena and Cheboygan. Refund of 50 cents per thousand not a rebate of main line rates, but a reduction of rates on "private tramways." Such a reduction not illegal, if made by railroad, but its enforcement by Commission is illegal and void.

Par. 22. No remedy at law.

Par. 23. Parties made defendant are the members of the Commission and also Frank W. Gilchrist, Churchill Lumber Co., Island Mill Company, and Fletcher Paper Co.

Prayer for Relief.

1. That the orders of October 22 and November 3, 1909, "so far as they purport or were intended to apply to private tramways or logging branches" may be declared unlawful and in violation of the 14th amendment.

448 2. That the rates fixed by said orders may be declared unreasonable and confiscatory and in violation of the 14th amendment.

3. That the orders may be decreed to require service for less than cost and a fair profit and therefore in violation of the 14th amendment.

4. That the provisions of sections 25 and 26 of the act, in regard to the burden of proof, "as construed and enforced by the State authorities" be declared to be in conflict with the 14th amendment.

5. That a special examiner be appointed to take testimony, etc.

6. That the enforcement of the orders be enjoined and that on the hearing the injunction be made perpetual.

7. Prayer for general relief.

EXHIBIT 8 C.

Demurrer of the Fletcher Paper Co., Frank W. Gilchrist, Churchill Lumber Co. and Island Mill Lumber Co. Filed Sept. 5, 1912.

These defendants say that the complainant has not stated such a case in its bill as entitled it to relief in a court of equity, for the following reasons:

1. Because the bill of complaint upon its face shows that it is filed for the sole purpose of again litigating a cause of action finally determined between the same parties in the Circuit and Supreme Courts of the State of Michigan, and further shows upon its face that the relief sought by complainant is barred and complainant's

449 rights in respect thereto adjudicated and concluded by the decree of the state court in said action.

2. Because the said bill of complaint does not state a cause of

action arising under the constitution or laws of the United States, and states no other ground of federal jurisdiction.

3. Because the ultimate relief sought by said bill of complaint is the issuance of an injunction in violation of the provisions of section 720 of the revised statutes of the United States.

GILLETT & CLARK,
Solicitors for Defendants, Fletcher Paper Co., Frank W. Gilchrist, The Churchill Lumber Co. and the Island Mill Lumber Company.

Dated Sept. 4, 1912.

EXHIBIT 8 D.

Demurrer of the Michigan Railroad Commission, Filed Sept. 27, 1912.

(Generally similar to Exhibit 8 C.)

EXHIBIT 8 E.

Objections, Affidavits, etc., of Fletcher Paper Company et al. to Application for Preliminary Injunction. Filed September 28, 1912.

Grounds of objection similar to grounds of demurrer (Exhibit 8 C). Affidavits annexed, also certified copies of various documents from files of state courts.

450

EXHIBIT 8 F.

Answer of Michigan Railroad Commission on Application for Injunction. (Filed Sept. 27, 1912.)

(Similar to Exhibit 8 E.)

EXHIBIT 8 G.

Opinion of Federal District Court, March 22, 1913.

Reported in 203 Federal Reporter at page 864.

EXHIBIT 8 H.

Order of District Court, Dated March 22, 1913.

Denying motion for preliminary injunction.

EXHIBIT 8 I.

Motion of Michigan Railroad Commission to Dismiss Bill of Complaint. Filed April 4th, 1913.

Grounds of motion similar to grounds of demurrer. (Exhibit 8 C.) Also because there is no equity on the face of bill.

EXHIBIT 8 J.

Motion of Fletcher Paper Company to Dismiss Bill of Complaint.

Similar to Exhibit 8 I.

451 EXHIBIT 9.

Motion Filed in the Supreme Court of the United States, Sept. 24, 1914.

Motion to dismiss, affirm, or transfer to summary docket with brief in support of motion.

EXHIBIT 10.

Brief for Appellant, in Same Case.

Filed in opposition to above motion.

EXHIBITS 11-13.

Briefs in Same Case.

Filed on final hearing.

EXHIBIT 14.

Opinion of Supreme Court of Michigan. July 25, 1914.

Granting writ of mandamus as reported in 182 Mich. 234.

EXHIBIT 15-20 (INCLUSIVE).

Records and Brief in Case Last Mentioned.

EXHIBIT 21.

Opinion of Supreme Court of the United States. Dec. 14, 1914.

Reported in 235 U. S. 402.

452 EXHIBIT 22.

Decree of Federal District Court. Dec. 28, 1914.

Dismissing Bill of Complaint.

EXHIBIT 23.

Opinion of Supreme Court of Michigan, Feb. 4, 1914.

Reported in 184 Mich. 242.

EXHIBITS 24-26 (INCLUSIVE).

Record and Briefs in Case Last Mentioned.

EXHIBIT 27.

Opinion of Michigan Supreme Court.

Reported in 185 Mich. 649.

EXHIBITS 28-34.

Motions and Briefs in Case Last Mentioned.

453 At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twentieth day of June in the year of our Lord one thousand nine hundred and seventeen. Present the Honorable Franz C. Kuhn, Chief Justice; John W. Stone, Russell C. Ostrander, John E. Bird, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Grant Fellows, Associate Justices.

No. 27863.

FLETCHER PAPER COMPANY

vs.

DETROIT & MACKINAC RAILWAY COMPANY.

This cause coming on to be heard is argued by Mr. Clark for the plaintiff and Mr. Baker and Mr. Henry for the defendant and is duly submitted.

Chief Justice Kuhn and Justices Bird and Fellows, being disqualified, did not participate in the above hearing.

454 *Opinion of the Court.*

State of Michigan Supreme Court.

FLETCHER PAPER COMPANY, Plaintiff and Cross-Appellant,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendant and Appellant.

Before Stone, Ostrander, Moore, Steere and Brooke, JJ.

Act No. 312, Public Acts of 1907, required railroad companies to file with the Michigan Railroad Commission, and to post in their offices and depots, tariff rates. After the act became effective, the Detroit & Mackinac Railway Company, a Michigan corporation, whose main line extended from Bay City on the south northerly through Alpena to Cheboygan, and which had branches and spurs extending into timber sections adjacent to its line of railway, published, pursuant to the act, tariff rates. The schedules of tariff rates were and are designated by the letters M. R. C., with numbers and other initial designations. February 20, 1909, a rate was published for carload shipments on logs between Alpena and what may be designated as the Fletcher dam, which provided a rate of $5 a car each way, and was designated M. R. C. 217. February 1, 1909, a rate was scheduled and published for carload shipments of logs to Alpena from various places on the lines of defendant railroad each way from Alpena, providing for a minimum of 2,500 feet per car, which fixed a rate on logs to Alpena from designated points north and south at $3 to $3.25 a thousand feet, and for a refund of 50 cents a thousand feet, the provision for the refund being:

"A refund of 50 cents per thousand feet on logs will be made when an equal amount of manufactured product is shipped out via the Detroit & Mackinac Railway."

It was known as M. R. C. 205. February 20, 1909, a rate was in like manner published for hauling logs in carload lots on a mileage basis, without reference to the places from or to which they were transported, and it contained the provision:

"The rates named herein apply only when the manufactured product is to be reshipped via Detroit & Mackinac Ry. and in the absence of tariff naming specific rates."

March 11, 1909, the Fletcher Paper Company filed with the Michigan Railroad Commission a complaint, alleging that the rate so fixed by M. R. C. 217 was unfair and retaliatory, praying for an order requiring the defendant to desist from violations of the law referred to in the said petition. To this the defendant filed a detailed answer. April 19, 1909, the Gilchrist Lumber Company and Island Mill Lumber Company filed with the Commission a complaint, alleging that defendant by its tariff M. R. C. 205 discriminated against Alpena shippers in favor of Cheboygan, and that the tariff was unjust and unduly discriminatory and higher than the rates

established by M. R. C. 208, and prayed for an order requiring defendant to cease and desist from violations of the law and to publish and file rates shown on an attached statement. To this the defendant filed its answer. After the filing of the complaints, and before proofs before the Michigan Railroad Commission had been concluded, defendant published a schedule of rates, designated as M. R. C. 237, abolishing all discriminations in favor of Cheboygan. The testimony of the complaining parties and of the defendant was taken in June, 1909, and on October 22d of that year the Commission made an order on the complaint last above referred to, the one made by Gilchrist and others, reciting that the matters alleged in the complaint were substantially true, and that the rates charged for the transportation of logs in carload lots to the said city of Alpena were unjust, unreasonable, and excessive, and ought to be reduced as therein set forth, and providing that the defendant railway company publish and file and put into operation so as to become effective 20 days from the service of the order a tariff for the transportation of logs in carload lots to the said city of Alpena according to rates set out in said order corresponding with M. R. C. 208. Following the statement of rates, the order contains the following:

"Above rates to apply when the manufactured product is reshipped via defendant company's line, and when not to be so reshipped, that defendant company are authorized to collect in addition to said rate, fifty cents (50c) per thousand (1,000) feet, but if later reshipment is made over defendant company's line, they are to refund to such shipper the fifty cents (50c) per thousand (1,000) feet collected."

No provision was made in this order for a minimum carload lot, and on November 3d following the Commission, without any further hearing, made a supplemental order, fixing the minimum at 2,500 feet per car. Upon the complaint of the Fletcher Paper Company, and on October 19, 1909, the Commission made an order, reciting that it appeared that the switching charge of $5 per car between Alpena and the dam (Fletcher dam or Broadwell dam) was unreasonable and unjustly discriminatory,
and that a rate of $3.50 per car would be reasonable and just,
455 and they ordered the defendant, within 20 days from the
date of service of a copy of this order upon it, to file, publish, and put into force a rate for such switching charge not to exceed $3.50 per car in each direction on all commodities, and ordering that M. R. C. 217 be canceled, and that the defendant cease, after said 20 days, from charging more than $3.50 a car for such switching charges. The order relating to switching charges was served on defendant November 4, 1909, and the final order, relating to freight rates, was served on November 6, 1909. It is from the time they became effective, that is, 20 days after service, that plaintiffs compute their damages. On June 30, 1909, Act No. 300 of the Public Acts of 1909 was approved, and it became effective in September. By its terms Act No. 312 of the Public Acts of 1907 was repealed so far as there was conflict between the two acts. The two acts are generally similar, and not different. As matter of fact, the defend-

ant did not actually file, publish, and put into effect the schedule of rates provided for in the orders which have been referred to, but the schedules, as hereinbefore designated, continued, so far as their publication and enforcement were concerned, unchanged until February 18, 1915. By Act 300, Public Acts of 1909, § 22, it is provided:

(*a*) Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of that complaint has been made and shall furnish a copy of the said complaint with said notice, and twenty days after such notice has been given the Commission may proceed to investigate the same as hereinafter provided. Before proceeding to make the investigation, the Commission shall give the said common carrier and the complainants at least ten days' notice of the time and place when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. Such hearings may be continued from time to time in the discretion of the Commission. If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulation, practice or service complained of shall be found to be unreasonable, inadequate or unjustly discriminatory, the Commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed on service rendered in future in lieu of that found to be unreasonable, inadequate or unjustly discriminatory, and in either case the Commission shall make an order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the common carrier affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof."

By section 25 it is provided that all rates fixed by the Commission, and all regulations, practices, and services shall be in force and shall be prima facie lawful and reasonable—"until finally found otherwise in an action brought for the purpose pursuant to the provisions of section twenty-six of this act or until changed or modified by the commission. * * *"

Every carrier is required (section 4) to furnish reasonably adequate service, making just and reasonable charges therefor, and every unjust and unreasonable charge for such service is prohibited

and declared to be unlawful. By section 10, subd. "g" it is provided:

"Within six months after the delivery of any shipment of freight at destination any person aggrieved may complain to the Commission that the charge exacted for the transportation of such freight between points in Michigan is irregular or exorbitant, and thereupon the Commission shall have power to investigate such complaint, and to hear the same and to decide upon the merits thereof, in the manner provided by section twenty-two of this act. If, upon such hearing, the Commission shall decide that the rate or charge exacted is irregular or exorbitant it shall find what, in its judgment, would have been a reasonable rate or charge for the service complained of. If the rate or charge so found shall be less than the charge exacted the carrier shall have the right to refund to the person paying such charge the amount so found to be excessive. In case of the refusal of the carrier to make such refund, the party aggrieved thereby may maintain an action in the courts of this state, to recover the amount of such excessive charge as found by said Commission, and in the trial thereof the findings of the Commission shall be prima facie evidence of the truth of the facts found by it, and no carrier shall be permitted to avail itself of the defense of such action that the shipment involved was in fact made on the published tariff rate in force at the time such shipment was made, but no carrier making a refund upon the order of the Commission or pursuant to a judgment of court as herein provided, shall be liable for any penalty or forfeiture, or subject to any prosecution under the laws of this state on account of making such refund."

Section 19 reads:

"If any common carrier shall do, or cause to be done, or permit to be done, any matter, act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, or by any lawful order made under the provisions of this act by the Michigan Railroad Commission, such common carrier shall be liable to the person, firm or corporation injured thereby in double the amount of damages sustained in consequence of such violation: Provided, that any recovery as is in this section provided shall in no manner affect a recovery by the state of the penalty prescribed for such violation."

By section 26 is provided the method by which the carrier or other party in interest may seek to have set aside, in the circuit court, in chancery, any order fixing any rate or rates, in which pro-
456 ceeding the complaining party has the burden of showing "by clear and satisfactory evidence" that the order of the Commission complained of is unlawful or unreasonable. One provision (*b*) of the section is that no injunction shall issue suspending or staying any order of the Commission, except upon application to the circuit court, in chancery, or to the judge thereof. Sections 32 and 47 are here set out.

"Sec. 32. Whenever, after hearing and investigation as provided in this act, the Commission shall find that any charge, regulation or practice affecting the transportation of passengers or property, or

any service in connection therewith not herein specifically designated, is unreasonable or unjustly discriminatory, it shall have the power to regulate the same as provided in section twenty-two of this act."

"Sec. 47. In addition to all the other remedies provided by this act for the prevention and punishment of any and all violations of the provisions hereof and of all orders of the Commission, the Commission, and likewise any person, firm or corporatin interested, may compel compliance with the provisions of this act and with the orders of the Commission by proceedings in mandamus injunction or by other appropriate civil remedies."

The defendant, following the provision of the statute, on November 20, 1909, filed its bill of complaint in the circuit court for the county of Wayne, in chancery, alleging reasons why the said orders of the Michigan Railroad Commission should not become effective and operative, and why the defendant should not publish a schedule of rates pursuant to such orders. It asserted that the proposed rates were unlawful and unreasonable, were not subject to the regulation or control of the Commission, were in conflict with the constitutional provisions and laws of the state, and in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. It prayed, among other things, for a temporary injunction restraining the Commission from enforcing, or attempting to enforce, such orders or making them effective. The chancellor made an order requiring the Commission to show cause on the 24th of November, 1900, why such an injunction should not issue, and, no one appearing at the time named in the order to show cause, a hearing was had, and, defendant being represented in court, a restraining order was issued, requiring the Commission to—

"desist and refrain from putting into operation or making effective three orders of said Michigan Railroad Commission directed to the Detroit & Mackinac Railway Company, said complainant, dated respectively October 22, 1909, October 19, 1909, and November 3, 1909, known and set forth in complainant's bill of complaint as Exhibits 1, 2 and 3, which said orders undertake to make a new tariff for the transportation of logs in carload lots to the city of Alpena over the Detroit & Mackinac Railway Company, other than the ones now in force and effect on said complainant's railroad until the further order of this court."

Later, on December 2, 1909, a stipulation was made in writing, signed by the solicitor for the complainant and the Attorney General of Michigan, which, omitting the title, is as follows:

"It is hereby stipulated by and between the attorneys for the respective parties hereto that the application for an injunction and the order to show cause made by said court, and the hearing thereon may be and is hereby continued in its present state until the final determination of said cause upon the merits thereof."

The Fletcher Paper Company, Frank W. Gilchrist, Churchill

Lumber Company, and the Island Mill Lumber Company upon their petition were permitted to intervene with the Michigan Railroad Commission as defendants in the chancery suit, and various parties were, in like manner upon petition, permitted to intervene as parties complainant, and all of such intervening parties, defendants, and the Michigan Railroad Commission filed answers to the bill of complaint; and, the cause being at issue, proofs were taken, heard, and a final decree dismissing the bill was entered therein, which decree was signed February 19, 1911. As originally submitted, the decree contained a provision for the dissolution of the injunction, which provision was struck out by the judge who signed the same. An appeal was taken from the decree of the Wayne circuit court to the Supreme Court, was heard, and the decree of the lower court was affirmed. Detroit & Mackinac Railway Co. v. Michigan Railroad Commission, 171 Mich. 335, 137 N. W. 329. Later, a writ of error to the United States Supreme Court having been refused unless defendants would execute a bond for the benefit of interested parties, which the defendants did not do, and an application for a writ of certiorari to the United States Supreme Court having been denied by one of the Justices of that court, the defendant, on August 17, 1912, filed a bill of complaint in the District Court of the United States for the Eastern District of Michigan, Southern Division, in equity, asking for a review of the orders of the Railroad Commission, Southern Division, in equity, asking for a review of the orders of the Railroad Commission as to their legality and effectiveness, and applying also for a temporary injunction. The Commision filed an answer to the bill and to the motion for injunction, and the matter was submitted September 27, 1912, to three federal judges, who, on the 22d of March, 1913, filed an opinion denying the motion for temporary injunction, from which decision an appeal was taken to the United States Supreme Court, the return on such appeal being filed June 28, 1913. The Commission and other defendants moved to dismiss such appeal or affirm the decree, and that court, December 14, 1914, affirmed the decree. Detroit & Mackinac Railway Co. v. Michigan Railroad Commission, 235 U. S. 402, 35 Sup. Ct. 126, 59 L. Ed. 288. A motion of the Commission to amend the decree in the principal cause was denied. 178 Mich. 250, 144 N. W. 689. June 16, 1914, the Michigan Railroad Commission petitioned the Supreme Court of Michigan for a writ of mandamus to compel the defendant to file and publish the orders made
457 by the Michigan Railroad Commission and comply with their provisions, which writ was granted pursuant to the petition July 25, 1914. Michigan Railroad Commission v. Detroit & Mackinac Railway Co., 182 Mich. 234, 148 N. W. 385. The defendant, on August 15, 1914, published a tariff of rates on the transportation of logs to Alpena, which was not approved, whereupon contempt proceedings against the defendant were instituted and were disposed of February 4, 1915. Michigan Railroad Commission v. Detroit & Mackinac Railway Company, 184 Mich. 242, 150 N. W. 861. February 18, 1915, a tariff was published by

the defendant, followed by a further motion in the contempt proceeding. Defendant moved to amend and modify the opinion reported in 184 Mich. 242, 150 N. W. 861. These motions were submitted April 6, 1915, and were denied April 22, 1915. Michigan Railroad Commission v. Detroit & Mackinac Railway Co., 185 Mich. 649, 152 N. W. 193. In the opinion of this court then delivered, one of the contentions of the relators is thus debated and disposed of:

"The second contention of relators again raises the question of the construction of the following paragraph contained in the order of the Railroad Commission, which was put into effect on February 19, 1915: 'Above rates to apply when the manufactured product is reshipped via the Detroit & Mackinac Railway Company. And when not to be so reshipped, the railway company will collect in addition to the above rates fifty (50) cents per thousand feet. But if later reshipment is made over the Detroit & Mackinac Railway, the company will refund to such shipper the fifty (50) cents per thousand feet collected.' It is shown by relators in this application that the respondents construe this clause as permitting them to charge in all instances the extra 50 cents per thousand feet and to rebate the same only when it is shown that the manufactured product is reshipped via the respondent railway company's lines, and this is urged by relators as a reason why a penalty should be inflicted. The construction given to this clause of the order by the respondents was urged upon the court in the original contempt proceeding, and we there held that their contention was untenable; this for the reason that they were plainly in contempt in failing to comply with the order of this court by putting into effect the orders of the Railroad Commission, as they were directed by this court to do. Having obeyed the order of the court by filing the rate fixed by the Commission, we are of opinion that their contention with reference to its construction may fairly receive consideration. A careful reading of the clause in question will serve to demonstrate its ambiguity. The last sentence of the clause, 'But if later reshipment is made over the Detroit & Mackinac Railway, the company will refund to such shipper the fifty (50) cents per thousand feet collected,' indicates very clearly that, in some instances at least, it was contemplated by the Commission that the higher rate should be charged and collected, and the extra 50 cents refunded only after reshipment over respondent railway company's lines had been made. It would not seem reasonable to suppose that the Commission intended one rule to apply to one shipper and another to another shipper; and such a result would be of doubtful legality even if intended. These views are based wholly upon the language of the clause in question, and are not predicated upon the contention of respondents that to compel them to carry, in the first instance, all logs at the lower rate, collecting the extra 50 cents only after they could make proof that the product had been reshipped over their line, would entail upon them unnecessary hardship and loss. Without determining that the construction given to the clause by the respondents is correct, we are satisfied that it is so far justified as to warrant us in withholding the infliction of a pen-

alty upon relators' theory that, acting under such construction, respondents still continue in contempt."

April 3, 1915, the Fletcher Paper Company, Island Mill Lumber Company, Richardson Lumber Company, Churchill Lumber Company, and Michigan Veneer Company each began a suit against the Detroit & Mackinac Railway Company in the circuit court for the county of Bay, filing in the said causes, respectively, a declaration, alleging the right to recover from the defendant the difference between the amount paid by them as shippers under the tariff published by the defendant and the tariff designated by the said several orders of the Michigan Railroad Commission, counting expressly on such orders, and including in their declarations the common counts in assumpsit. They served with the declarations bills of particulars, consisting of a summary by years of the alleged overcharges and interest thereon. The defendant in each case appeared and demanded a more specific bill of particulars, and moved to dismiss for want of jurisdiction, and thereafter, on May 12, 1915, demurred to each of the said declarations. Six grounds of demurrer were alleged, as follows:

"I. The common-law remedies for irregular, exorbitant, unreasonable or excessive charges or exactions by common carriers for the transportation of freight between points in Michigan have been abrogated and abolished by subdivision 'g,' § 10, Acts No. 300, Public Acts 1909, pp. 704, 715, as re-enacted by Act No. 139, Public Acts 1911, pp. 205, 209, the same being the acts of the Legislature of this state, defining and regulating common carriers and creating the Michigan Railroad Commission.

"II. The plaintiff seeks reparation without having made any complaint to the Michigan Railroad Commission under said subdivision 'g'; and the special counts of its declaration do not show that complaint has been made to the Commission, or that the Commission has made any findings or orders on complaints made under said subdivision.

"III. It appears by the special counts of the plaintiff's declaration that the orders therein set forth of October 22, 1909, and November 3, 1909, were not put in force by filing a schedule or tariff until February 18, 1915, and that the plaintiff's cause of action is for alleged excessive charges before that date.

"IV. It does not appear by the plaintiff's declaration that the order therein set forth of October 19, 1909, was ever put in force by the filing of a tariff or otherwise.

"V. No cause of action is set forth in the special counts of the plaintiff's declaration.

"VI. The plaintiff's bill of particulars shows that it has no cause of action under the common counts of the declaration, other than the alleged causes of action in the special counts."

The motion to dismiss was denied, and an order overruling the demurrers was entered July 7, 1915. July 12, 1915, an application was made to the Supreme Court for a writ of cer-
458 tiorari to review the order overruling defendant's demurrers, which application, on July 23, 1915, was denied. There-

upon, July 23, 1915, the defendant pleaded, giving notice of certain special and affirmative defenses. A more specific bill of particulars was filed, with certain stipulations of counsel. On December 31, 1915, the following stipulation was filed in the cause:

"For the purpose of facilitating the trial of these cases, it is hereby stipulated as follows:

"A bill of particulars and a more specific bill of particulars have been furnished in the Fletcher Paper Company case, and bills of particulars similar to the more specific bill of particulars in the Fletcher Paper Company case have been furnished in all of the other cases. The more specific bill of particulars in the Fletcher Paper Company case has been checked by defendant and certain amendments which have been agreed upon will be made by a stipulation to be hereafter filed. In the other four cases, the bills of particulars furnished will be checked over by defendant's accountants as rapidly as possible, and a list of the disputed or incorrect items (if any) will be furnished plaintiff's attorneys in each case as soon as possible, and an effort will be made to ascertain and agree upon the facts in regard to each. A stipulation covering the facts, so far as they can be agreed upon, will be filed in each case, leaving in dispute upon the trial only such items (if any) as cannot be disposed of by such stipulations. In order to satisfy plaintiffs that the work of checking up the bills of particulars is proceeding with reasonable speed, any representative of the plaintiffs may at any time make inquiries at the office of the defendant at Alpena, and will be given information in regard to the rate of progress that is being made.

"Defendant will make all possible efforts to complete the work of checking up the bills of particulars promptly so that the cases may be tried at the earliest date consistent with the completion of that work. If that work can be completed during the December term of the circuit court for the county of Bay, then the said cases shall be placed upon the docket for that term to be tried as soon as possible thereafter. If there is any unreasonable delay on the part of the defendant, plaintiffs may apply to the court by motion on the usual four days' notice, and the court, on the hearing of said motion, may set the cases for trial or may make such other order as may seem to him proper for the purpose of expediting the preparation and trial of the cases.

"All of the cases shall be consolidated for trial as far as possible in the following manner: All of the cases shall be submitted to the same jury (or to the court) at the same time. If the attorneys for all parties can agree that there are no questions for a jury, a jury will be waived by all parties. The parties will first introduce so much of their evidence as may apply jointly to all of the cases, and will then introduce separately the evidence applying to each one of the cases separately, and the court or jury shall make a separate finding or verdict as to each with the same effect as if they had been separately tried. A separate judgment shall be entered in each case.

The issues joined came on to be tried September 19, 1916, without a jury. Plaintiffs' counsel offered in evidence the proceedings

in the so-called rate cases, including the files, pleadings, evidence, record and briefs in all of the court hearings hereinbefore referred to, concluding with evidence of computations of the amounts claimed and interest to various periods in the progress of the rate cases proceedings, with other evidence and depositions.

It appeared, among other things, that the Fletcher Paper Company does not manufacture lumber. All forest products received by it are made into paper. In addition to what it receives via defendant's line, it also receives logs by water. Ninety-eight per cent. of its output goes out over defendant's line. During six years, its average was 1,834 pounds of paper to 1,000 feet of logs. It shipped in by rail 20,481,619 feet of logs and shipped out by rail 117,408,-337 pounds of paper. This shipment of paper represents the manufactured product of more than 64,000,000 feet of logs.

All of the manufactured product of the Michigan Veneer Company from logs shipped in by rail went out by rail excepting six boat shipments, during the six years in question. These were more than offset by the product of logs brought in by team.

In the cases of the Michigan Veneer Company and Fletcher Paper Company, the computation of plaintiffs' demand is made by using the flat commission rate, saying nothing about the 50 cents per thousand, and the rate actually paid.

The claims of the other plaintiffs are not materially different from each other. They operated sawmills, shipping out timber by rail and by water.

"Their claims for overcharges are first computed by subtracting from the amount paid on each shipment the commission rate without any allowance for the differential. Outshipments of lumber by rail are then shown, and are subtracted from the total amount of logs shipped in by rail. The difference represents such of the logs shipped in by rail as were not reshipped by rail, and upon this difference the sum of 50 cents per thousand was computed and deducted from plaintiff's claim (in this way being added to the commission rate) as a penalty for failure to reship this part of the manufactured product by rail. In these cases it does not appear, and cannot be made to appear, just how much of the lumber reshipped by rail was sawed out of the individual logs that were shipped in by rail. The logs and the lumber were both necessarily confused in the process of manufacture, but the lumber reshipped was identical in every respect with the lumber manufactured from logs shipped in by rail, and may have been actually manufactured from those logs."

Defendant made a statement of the defense, giving an outline of events connected with the matter in issue, and moved to dismiss the causes. Before that motion was decided, defendant offered to submit proofs in addition to the documentary evidence and other evidence before the court, which motions were taken under consideration. The offer to prove was calculated to present the issue that the rates fixed in the orders of the Michigan Railroad Commission were in fact confiscatory and therefore unlawful. Stated otherwise, the position asserted was that the rates collected were in fact fair and

277

reasonable rates. Later, September 27, 1916, a motion was made and filed, praying for an order requiring plaintiffs to elect
459 whether they would rely upon the statutory counts in their declarations, or whether they would rely upon the common counts in assumpsit and seek a recovery under a general common law remedy. November 13, 1916, the court filed an opinion in the several causes, with findings of fact and conclusions of law, denying defendant's motion to dismiss, refusing proofs under defendant's offer, determining that each of the plaintiffs was entitled to the full amount of its claim, with interest, and directing that judgment should be entered November 20, 1916, in pursuance of said opinion, findings, and conclusions. On the 16th of November, 1916, the plaintiffs moved the court to double the damages indicated by the opinion and findings. This motion was denied, and, on November 27, 1916, judgments were rendered for the plaintiffs for the amounts of said overcharges, respectively, with interest at 5 per cent. from the time such overcharges were respectively made to November 13, 1916. The judgments were: For the Fletcher Paper Company, $25,788.13; Richardson Lumber Company, $28,239.65; Island Mill Lumber Company, $24,534.33; Churchill Lumber Company, $14,336.13; Michigan Veneer Company, $6,058.19.

A motion for a new trial was made by defendant, which was denied. The defendant excepted to the findings of fact and law, to the refusal to dismiss the proceedings and render a verdict of no cause of action, to the refusal to grant a new trial, and it is not claimed, and it does not appear, that the questions presented and argued upon the appeals are not properly saved. The defendant sued out its writ of error in each of said causes; the plaintiffs, excepting to the refusal of the court to double the damages, are also plaintiffs in error.

Three of the five plaintiffs, Fletcher Paper Company, Richardson Lumber Company, and Michigan Veneer Company, made no complaint to the Railroad Commission, and no order was ever made by the Commission in their behalf upon their application, excepting the order with respect to the Fletcher Paper Company's switching rate. Two of the plaintiffs, Richardson Lumber Company and Michigan Veneer Company, did not intervene in the litigation to fix or enforce the said rates. All plaintiffs have however, been treated alike in the proceedings had in the court below to the rendition of the judgments.

The principal questions presented and argued for defendant are: (1) Whether a complaint to the Michigan Railroad Commission is not a necessary preliminary to any action by a shipper or consignee to recover excessive rates or charges which have been already collected by a carrier. (2) Whether an injunction issued to prevent an order of the Commission from taking effect, no bond being required from the carrier and no order impounding the overcharge, does not prevent the order from having any force or effect until the Commission obtains and serves a mandamus commanding the carrier to put the order into effect. (In this connection the effect of the stipulation entered into by the Attorney General is discussed.)

(3) Was the defendant entitled to prove on the trial that the rates and charges it collected were just and reasonable? (4) Should the court below have required the plaintiffs to elect whether they would seek to recover on common-law grounds or under the statute? (5) Is the rebate of 50 cents per thousand feet of logs shipped into Alpena on the defendant railroad in case the manufactured product is shipped out thereon a legal discrimination against those who shipped out by water? (6) Is there any ground on which any of the damages recovered or recoverable by plaintiffs can be doubled?

Plaintiffs state, also, substantially the same questions, as follows:

"(1) Is a freight rate fixed by a state railroad commission considered as the lawful rate, during chancery litigation to determine its legality?

"(2) To what extent is the chancery decree to be considered as res judicata?

"(3) Is the general rule changed by the delay of the railroad company in publishing and posting a new tariff in compliance with the orders of the Commission?

"(4) Is the general rule affected by delay in the enforcement of the rate by mandamus?

"(5) Is the application of the general rule in this case changed by the injuction issued by the chancery court or the stipulation of the Attorney General in respect thereto?

"(6) Is there any distinction between a common-law action and a statutory action in such a case, and has there been any failure to select the proper remedy or to follow any statutory requirements which are necessary preliminaries to such an action? (*a*) In general. (*b*) Defendant's offer of proof.

"(7) What are the plaintiffs' rights in respect to an allowance for the outshipment of the manufactured product? (*a*) Validity of provision for credit on reshipment. (*b*) Construction and application.

"(8) Is the situation in any way affected by the motion for a new trial?

"(9) Plaintiffs' motion for double damages and the cross writ of error based thereon. (*a*) Double damages not a penalty. (*b*) Rule to be applied if double damages are considered as a penalty.

"(10) 'Election of remedies.'

"(11) Defendant's demurrer."

OSTRANDER, J. (after stating the facts as above). The Michigan Railroad Commission determined that certain rates (charges) theretofore published and exacted from shippers by defendant were unreasonable and ought not to be exacted, and that certain other rates (charges) were and would be reasonable and proper to be ex-
460 acted and should thereafter be exacted. The action of the Commission furnished for the benefit of any and every shipper evidence that the old rates were illegal, the new rates reasonable and lawful. Although liable to be set aside by the courts, the result of what the Commission did was a legislative rate, immediately in effect. Mich. Cent. R. Co. v. Circuit Judge, 156 Mich. 459, 120

N. W. 1073; Mich. R. R. Com. v. Mich. Cent. R. Co., 159 Mich. 580, 124 N. W. 564; D. & M. Ry. Co. v. Mich. R. R. Com., 171 Mich. 335, 137 N. W. 329; Mich. R. R. Com. v. D. & M. Ry. Co., 178 Mich. 230, 144 N. W. 696. See D. & M. Ry. Co. v. Mich. R. R. Com., 240 U. S. 564, 36 Sup. Ct. 424, 60 L. Ed. 802.

This point, a vital one, may be restated. The rates fixed by the Commission were not effective when, and if, an attack upon them failed, but were effective at once and pending any attack upon them.

Attacks made by defendant upon the action of the Commission failed. The commission has not itself modified its determination. It is admitted that defendant has refused to conform to the orders of the Commission, and has exacted from plaintiffs rates (charges) higher than those fixed by the Commission. It has therefore money which in equity and good conscience belongs to the plaintiffs, which it ought to restore to them. Putting aside the question of the effect of the injunction and the question whether the statute has provided a method for recovering such exactions, no reason appears for denying to plaintiffs, or any other affected shipper, the right to recover from defendant all of the money so illegally taken from them, in an action of assumpsit in which it is wholly immaterial whether they declare upon the statute and the action of the Commission or upon the common counts. As was said by Carland, J., in Love v. North American Co., 229 Fed. 103, 143 C. C. A. 379:

"The railroad company got this money into its treasury by superseding rates that were fixed by authority of the state. When those rates were sustained, the carrier was bound to restore its excessive exactions. This was a duty not only to the shippers; it was a public duty owing to the state, whose orders had been superseded."

The action of the Commission, in any event, furnishes the necessary evidence of the unlawful character of the exaction.

It is clear, I think, that plaintiffs have no statute remedy, and that the statute does not seek to interfere with or amend the remedy at common law. Plaintiffs base their actions precisely upon the action of the Commission. Everything essential to a recovery, so far as the character of the exaction is concerned, has been determined by the Commission, whose determination they rely upon. If it were otherwise, if the charges exacted by the defendant had been duly fixed according to the act and approved by the Commission, and they were attacked, a different question would be presented. In such a case, the Commission, and not the courts, should be first applied to. In the first place, the Commission is the rate maker; in the second place, it would be wholly incongruous from an administrative standpoint to have successive juries, or different courts and judges, passing upon the reasonableness of a rate already fixed by the Commission. To this effect are the decisions in Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Robinson v. Balt. & O. R., 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288; Gimbel Bros. v. Barrett (D. C.) 215 Fed. 1004. These cases are authority, also, for the rulings of the trial court refusing to receive and consider offered evidence, and denying defendant the

right to try out in these cases the question of the reasonableness of the exactions it made.

Defendant does, indeed, say that the charges made by it were once approved, and were published as its rates, and, until suspended, were lawful rates; this is a part of an argument which asserts that only the voluntary action of the carrier or the writ of mandamus can put into operation rates fixed by the Commission. It makes little difference whether we do or do not say that the new rates were in effect, or whether we say they were in effect, but not in operation. The old rates were condemned as unreasonable, and the new ones approved as reasonable by the Commission, action which is now, and was when these suits were begun, conclusive upon defendant.

Instead of publishing and collecting rates fixed by the Commission, defendant sought and obtained an injunction restraining the Commission from putting into operation its said orders. The statute plainly recognizes the authority of a court of equity to so suspend the operation of the orders of the Commission. The case of the defendant is not, however, that of one prevented from doing something, pleading the prevention in excuse, or bar, of the consequences of its enforced nonaction. On the contrary, it is pleading its own action, pleading the injunction it sought for and secured upon representations held to be unfounded, as an excuse for retaining an exaction at all times prima facie unlawful, and, finally, in its own suit, conclusively determined to be unlawful. The temporary injunction permitted defendant, notwithstanding the orders of the Commission, to continue to take what its published tariffs called for, but it is not apparent, and is not pointed out, how it legalized the exaction. See Pac. Gas & Elec. Co. v. San Francisco (D. C.) 211 Fed. 202; Spring Valley Water Co. v. San Francisco (C. C.) 165 Fed. 667; Re Arkansas R. R. Rate (C. C.) 168 Fed. 720;
461 Bellamy v. Railway Co., 220 Fed. 876, 136 C. C. A. 442; State v. Railway Co., 265 Mo. 646, 178 S. W. 129, L. R. A. 1916C, 309.

It will be perceived that the order of the Commission fixes freight rates to apply when manufactured product is reshipped via defendant's line, and, when not so reshipped, the defendant is permitted to collect 50 cents per thousand feet additional, to be refunded, however, if shipper later ships out the manufactured product or some of it. Ambiguous the order in some respects is, but not, I think, in respect to the rate. The order made a rate of $1 a thousand for logs in car loads moving 10 miles or less, and varying rates as the distance was increased. To them defendant was permitted to add 50 cents a thousand, no matter what the length of haul, if the product was not shipped out by its line. Defendant could take nothing from these rates. What it did was to enforce its old tariff of $3 and $3.25 per thousand feet, which tariff contained the provision for a refund of 50 cents per thousand when an "equal amount of manufactured product" was shipped out over its line. Defendant says that:

"The rebates offered by the railroad company and the provision to the same effect in the order of the Railroad Commission"

—are a plain violation of the act. If a rebate was intended, or was provided for, a discrimination in favor of particular shippers, no difference of opinion would exist. This provision was not questioned in the bill filed by the defendant. In my opinion, there is no rebate, no discrimination, provided for in the order. A uniform rate is established, and with it a milling in transit rate, not necessarily unlawful and not shown here it be unlawful. Watkins on Shippers and Carriers (2d Ed.) § 169; Transp. of Wool, Hides, and Pelts, 23 Interst. Com. Com'n R. 151; Transit Case, 24 Interst. Com. Com'n R. 340; Laurel Mills v. Railroad Co., 84 Miss. 349, 37 South. 134, 66 L. R. A. 453. The statute, section 11, reads:

"Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions. * * *"

Defendant says however, that to entitle any of the plaintiffs to the flat mileage rate fixed by the Commission, they must have proved, not only that the manufactured product reshipped equaled the product of the logs shipped in by rail, but also that it was actually made from the logs shipped in by rail. This contention is not debated in the briefs for defendant. A reasonable interpretation of the language sustains the conclusion that tonnage generally, and not the tonnage of particular logs, was intended. In operation, the tariff, so interpreted, will not necessarily conflict with the law if the product shipped out is identical with the product of logs which were actually shipped in, logs which moved into the transit point under the transit rate. We are required here to go no further than this. The subject generally has, however, had the attention of the Interstate Commerce Commission, which, first adopted a governing rule, later abolished the same as inadequate, and thereafter treated each case as it arose. In the Matter of the Investigation into the Substitution of Tonnage at Transit Points, 26 Interst. Com. Com'n R. 204. See Sondheimer Co. v. Railroad Co., 20 Interst. Com. Com'n R. 606; Watkins on Shippers and Carriers (2d Ed.) § 169. The conclusion of the trial court is not out of harmony with the views of the Interstate Commerce Commission upon this point. I have not overlooked the North Carolina cases (Lumber Co. v. Railroad Co., 136 N. C. 479, 48 S. E. 813; Hilton Lumber Co. v. Atlantic Coast Line, 141 N. C. 171, 53 S. E. 823, 6 L. R. A. [N. S.] 225) cited by defendant, nor the claim of defendant that this court, in Mich. R. R. Com. v. Detroit & M. R. Co., 185 Mich, 649, 653, 152 N. W. 193, held directly, or by implication, that the 50 cents differential here in question is not recoverable by plaintiffs as an excessive charge. I find nothing in these decisions to sustain any contention made here by defendant.

With the computations, upon which the verdicts and judgments are based, we have nothing to do, since counsel have agreed that, if

the method followed is the correct one, the results of the computations are correct. The defendant's exceptions must be overruled.

What remains is the question of the right of the plaintiffs to have their damages, or any of them, doubled by the court. I shall not consider whether the statute provision for double damages is a provision for a penalty or for compensation. I am of opinion that it should not be applied in the cases at bar. The carrier, the defendant, has neither done, nor permitted to be done, anything prohibited by the act, or by it declared to be unlawful, beyond this, that while questioning it has refused to put a tariff into operation conduct approved by the court of chancery when it suspended by its process the operation of the orders of the Commission. I have held that defendant may not profit by its said conduct, or by the said action of the court. And, on the other hand, what damages have been suffered by plaintiffs? Clearly, they are no other or different in kind than those suffered by any other shipper from whom the illegal charges were exacted. They have lost the use of money, of which defendant has had the use. Return of the sums exacted and interest is compensation. For this, the judgments, respectively, provide.

The judgments are affirmed. Neither party will recover costs of the appeal as against the others.

(Signed:) RUSSELL C. OSTRANDER,
J. W. STONE,
J. H. STEERE,
FLAVIUS L. BROOKE,
JOSEPH B. MOORE.

[Endorsed:] Filed Sept. 27, 1917, Jay Mertz, Clerk Supreme Court.

462 At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-seventh day of September, in the year of our Lord one thousand nine hundred and seventeen.

Present: The Honorable John W. Stone, Russell C. Ostrander, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Justices.

No. 27863.

FLETCHER PAPER COMPANY, a Corporation, Plaintiff and Cross-Appellant,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, a Corporation, Defendant and Appellant.

The record and proceedings in this cause having been removed to this court by Writ of Error, issued to the Circuit Court for the County of Bay, and the same, and the matters in error assigned, having been seen and inspected and duly considered by the Court,

and it appearing to this Court that in said record and proceedings, and in the giving of judgment in said Circuit Court there is no error, therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Bay (State of Michigan) be and the same is hereby in all things affirmed.

No costs will be awarded either party hereto.

463 Supreme Court of the United States, October Term, 1917.

DETROIT & MACKINAC RAILWAY COMPANY, Plaintiff in Error,

vs.

FLETCHER PAPER COMPANY, Defendant in Error.

Petition for Writ of Error.

To the Honorable William R. Day, Associate Justice Supreme Court of the United States:

Your petitioner, the Detroit & Mackinac Railway Company, respectfully shows: That it is the defendant in a cause which was commenced April 3rd, 1915, in the Circuit Court for the County of Bay, in the State of Michigan, by the Fletcher Paper Company, a Michigan corporation, located at the City of Alpena, Michigan; that the issue joined in said cause was tried before the court without a jury on the 19th day of September, 1916, and on November 27th, 1916, a judgment was rendered in favor of the Fletcher Paper Company and against your petitioner, the Detroit & Mackinac Railway Company, for Twenty-Five Thousand, seven hundred eighty-eight and 76/100 ($25,788.76) Dollars, damages and costs taxed at Ninety and 50/100 ($90.50) Dollars; that said cause was removed to the Supreme Court of Michigan, the court of last resort, by a Bill of Exceptions and a writ of error; that the Supreme Court of Michigan affirmed said judgment on the 27th day of September, 1917, 164 N. W. Rep. 528.

464 Your petitioner further shows that on the trial of said cause in the Circuit Court for the County of Bay, there was drawn in question the validity of a statute of, and of an authority exercised under the State of Michigan on the ground of their being repugnant to the constitution and laws of the United States, and the decision of said Circuit Court and of the State Supreme Court was in favor of their validity and against the rights especially set up and claimed by your petitioner as the defendant in said cause as follows:

First.

The declaration of the plaintiff contains the common counts and a special count based on the orders of the Michigan Railroad Commission of October 19th and October 22nd and November 3rd, 1909,

directing the Detroit & Mackinac Railway Company to "publish, file and put into operation so as to become effective twenty (20) days from date of the service of this order on defendant, a tariff for the transportation of logs in carload lots to the said City of Alpena, said order being in the words and figures following (Record, pp. 3, 4, 5):

465 STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

Session of the Michigan Railroad Commission held at its offices in the city of Lansing, on the 22d day of October, A. D. 1909.

D-188.

F. W. GILCHRIST, CHURCHILL LUMBER COMPANY, ISLAND MILL LUMBER COMPANY, Complainants,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendants.

Complaint having been made by the above named complainants charging that the above named defendant by its public tariff now in effect for the transportation of logs to the city of Alpena, state of Michigan, is charging rates that are unjust, and discriminatory, and issue having been joined thereon by the said parties and a hearing having been had wherein the parties were present and represented by counsel and the evidence and arguments of counsel having been duly considered by the commission, the commission doth find that the matters alleged in the complaint are substantially true and that the rates charged for the transportation of logs in carload lots to said city of Alpena are unjust, unreasonable and excessive, and that said rates should be reduced as hereinafter set forth;

Now, therefore, by virtue of the authority vested in us by law, it is hereby ordered that the Detroit & Mackinac Railway Company do publish, file and put into operation so as to become effective twenty (20) days from the date of the service of this order on defendant, a tariff for the transportation of logs in carload lots to the said city of Alpena as follows:

Ten (10) miles or less not to exceed one dollar ($1.00) per thousand (1,000) feet;

Over ten (10) miles and not exceeding twenty (20) miles, not to exceed one dollar and thirty three cents ($1.33) per thousand (1,000) feet:

Over twenty (20) miles and not exceeding thirty (30) miles, not to exceed one dollar and sixty-seven cents ($1.67) per thousand (1,000) feet;

466 Over thirty (30) and not exceeding fifty (50) miles not to exceed two dollars ($2.00) per thousand (1,000) feet;

Over fifty (50) and not exceeding eighty (80) miles, not to exceed two dollars and thirty-three cents ($2.33) per thousand (1,000) feet;

Above rates to apply when the manufactured product is reshipped via defendant company's line, and when not so to be reshipped, that defendant company are authorized to collect in addition to said rate fifty cents (50c) per thousand (1,000) feet, but if later reshipment is made over defendant company's line, they are to refund to each shipper the fifty cents (50c) per thousand (1,000) feet collected, and,

It is further ordered, that the books of both defendant company and complainants (and all other shippers of logs affected by this order), shall show plainly the total of inbound shipments and the reshipment of the manufactured product; and,

It is further ordered, that these rates apply to all classes of logs transported by said defendant to said city of Alpena, within the distance above set forth.

GEORGE W. DICKINSON,
JAMES SCULLY,
Commissioners.

467 A similar order fixed the rate for the switching charges between Alpena and Broadwell's Dam. (Record p. 2-3).

These orders became effective Nov. 26th, and 27th, 1909, but the railroad company continued to collect its former tariff rates, until February 15th, 1915, when it filed and published a tariff in compliance with the said orders.

During that period of over five years the railroad company collected in small payments in excess of the rates fixed by said orders, switching charges, amounting to $6,599.00, and log freights, general, $16,476.75, and Onaway and Northern Michigan Railway, $2,609.85; total $25,685.60 (Record p. 53)

A bill of particulars was filed and a copy furnished to counsel for defendant showing the payments made in detail, item by item. (Record pp. 15-16; Id. 137-145)

The defendant filed a plea of the general issue, with notice of special matter, which notice is as follows: (Record pp. 35, 36)

"To said plaintiff:

You will take notice that at the trial of the above entitled cause the defendant will insist and prove under the general issue above pleaded that the rates fixed by the said orders of October 19th, October 22nd and November 3rd, 1909, are unreasonable and confiscatory in that said rates are not sufficient to cover the cost of hauling logs in carload lots from logging branches to the City of Alpena and that said rates have been shown by practical experience to seriously impair the net profits and income of the Detroit & Mackinac Railway Company and said rates violate the provisions of the Fourteenth Amendment of the Constitution of the United States, that no state shall deprive any person of life, liberty or property without due process

of law, nor deny to any person within its jurisdiction the equal protection of the laws.

On the trial of the case the defendant will invoke against the alleged causes of action of the plaintiff the protection of said constitutional provisions."

An amended plea and notice was filed, and notice of special and affirmative defenses in eighteen sub-divisions. The second sub-division reads: (Rec. p. 37)

"Second. That said rates violate the provisions of the Fourteenth Amendment of the Constitution of the United States, in that no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The sixteenth sub-division concludes as follows: (Record p. 45)

468 "and that there was no legal complaint before said commission upon which to base said orders as aforesaid, and that said commission was without jurisdiction to make said orders, and that the same became and was and are an invasion of the constitutional rights of said defendant and in violation of the Fourteenth Amendment of the Federal constitution of the United States."

When the order of October 22nd, 1909 was introduced in evidence counsel for defendant made this objection, which was overruled: (Record p. 81)

"I object to that order on the ground that there was no complaint to the Michigan Railroad Commission that the rates to Alpena on logs were unjust, unreasonable and excessive, and that there was no hearing on any such allegation before the Railroad Commission, no evidence was introduced to show that the rates to Alpena were unjust, unreasonable and excessive, the complaint in that case related exclusively to the discrimination in favor of shipments as against Alpena, and I insist that to sustain this order and grant the plaintiff any relief on this order would be a violation of the due process of law — of the Fourteenth Amendment, and of the same clause in our own constitution. I also make the objection that the privision in this order for a fifty cent refund was an improper rebate and discrimination in favor of the Fletcher Paper Company and is absolutely void in and of itself, a violation of the Michigan act. Our position in regard to that is that all shippers living in Alpena are entitled to the same rate, regardless of what they do with their products."

At the close of the testimony for the plaintiff, counsel for defendant, moved the court to dismiss the case for eighteen different reasons, (Record pp. 184-199) among them the second, which reads:

2nd. That said rates violate the provisions of the Fourteenth Amendment of the constitution of the United States, in that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The sixteenth reason concludes as follows:

"and that said Commission was without jurisdiction to make said orders, and the same became and was and are an invansion of the constitutional rights of said defendant and in violation of the 14th amendment of the Federal Constitution of the United States."

The eighteenth reason was supplemented as follows:

"I want also to read into the record some additional reasons: To hold that the rates fixed by the orders of October 22nd and November 3rd, 1909, were in force before the judicial controversy was terminated by the granting of the writ of mandamus by the
469 Supreme Court of Michigan, July 25, 1914, would be a violation of the due process of law and the equal protection of the law clauses of the 14th amendment of the constitution of the United States."

Second.

The Michigan act, for the regulation of common carriers, subd. (*g*) of Sec. 10, 2, Comp. Laws, 1915, sec. 8118 p. 2918, provides that within six months after the delivery of any shipment of freight, on which the carrier exacted an excessive rate, the person aggrieved can complain to the railroad commission, and after notice to the carrier and a hearing, determine the question whether the charges exacted were excessive, and if so, order the carrier to refund the excess. Suit against the carrier is authorized to recover the sum awarded, and the carrier is not permitted to avail itself of the defense that the shipment involved was in fact made on the published tariff in force at the time the shipment was made.

Under this provision the whole question of the reasonableness of rates, which have been exacted and paid is litigated, and the carrier is given an opportunity to submit proofs on that question; claiming that right, counsel for the defendant made an elaborate offer of proofs showing that the rates the railroad company had collected were reasonable and just. (Record pp. 199-202)

The Bay Circuit Court, and the Supreme Court held that the proofs offered were not admissible in evidence. The ruling of the Circuit Judge is at the bottom of p. 209 of the record. The ruling of the Supreme Court is at the close of the paragraph of the opinion of the court by Justice Ostrander, numbered 2, 3.

Third.

There is another question presented by the record in this case that is not dependent on any statutory provision but wholly depends on the reasons and principles of the common law.

How long is an order of the Michigan Railroad Commission fixing rates to be considerd res adjudicata and conclusive and binding?

The answer is, just so long as there are no material changes in the conditions governing the reasonableness of the rates so fixed.

The testimony in the Wayne Circuit in the rate case was brought to a close on the 10th day of August, 1910, and all the facts that could have possibly been considered by either the railroad
470 commission, the learned judge of the Wayne Circuit, or by the Supreme Court, must have occurred before that date.

The Detroit & Mackinac Railway Company has a record of the actual amounts collected during the whole period of five years, together with a complete account of its total revenue and operating expenses, and of the amounts it would have annually lost, if it had collected the rates of the railroad commission instead of its own higher rates.

Here is an actual practical demonstration that the rates fixed by the railroad commission were unreasonable and confiscatory.

For the four years following August 10, 1910, the conditions were such and there had been so great a change in the nature of the proofs, that the rule of res adjudicata is not applicable.

The proofs offered should have been admitted in evidence. The right of the plaintiff to introduce counter proofs is beyond question, and upon all the facts before him, the Circuit Judge, could have made a just decision sustaining either the rates of the railroad company or those of the commission.

To deny such a trial and hearing is a plain denial of due process of law and of the equal protection of the laws in violation of the Fourteenth Amendment.

Fourth.

While the railroad of the Detroit & Mackinac Railway Company is wholly within the State of Michigan, and it does an intra-state business thereon, yet it is also engaged in an interstate business and transports freight in carload lots to Ohio and other states of the United States and to the Dominion of Canada, and as to all such traffic it is subject to the interstate commerce act, and to the rules and regulations of the interstate commerce Commission; that large shipments of paper by the Fletcher Paper Company, and of lumber and veneer in carload lots by the other plaintiffs are made in such interstate and foreign traffic and commerce and the same being subject to the interstate commerce act and to the rules and regulations of the Interstate Commerce Commission, the said act of the Michigan legislature as construed and applied by the Supreme Court of the State in its said opinion, conflicts with a regulation of interstate com-

merce established by Congress in virtue of its constitutional
471 power and authority over interstate commerce, in this that congress has said in the act of February 19, 1903, 32 Statutes at Large 847, commonly called the Elkins act, that

"It shall be unlawful, for any person, persons or corporation to offer, grant, or give or to solicit, accept, or receive any rebate concession or discrimination in respect of the transportation of any property in interstate or foreign commerce, by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereto or whereby any other advantage is given or discrimination is practiced."

Section 2 of the Act of June 29th, 1906, 34 Stat. at Large, 584, commonly called the Hepburn Act, contains the following provision:

"Nor shall any carrier charge, demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified nor extend to any person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs."

Then follow provisions penalizing not only the carrier, but also its agents, officers and servants, and also the shipper or consignee.

So that if the Detroit & Mackinac Railway Company pays the rebate of fifty cents per thousand feet of logs, sustained by the Supreme Court of Michigan, as a milling in transit rate, it and its officers and agents and servants, will be subject to punishment by heavy fines or imprisonment or both, imposed by said act.

And the plaintiff in error assigns as error, that part of the opinion of the Supreme Court of Michigan which sustains said fifty cent rebate as valid, as being in conflict with a regulation to the contrary established by congress under its paramount constitutional power and authority.

The decisions of the Interstate Commerce Commission cited by Justice Ostrander for the Supreme Court of Michigan do not sustain the conclusion reached by that court, and if they may be so regarded, they are overruled by Lehigh Valley R. R. Co. v. United
States, 243 U. S. 444, which case is not mentioned by Jus-
472 tice Ostrander, although in the brief of the Detroit & Mackinac Railway "on the question whether the rebate of fifty cents per thousand is valid," pp. 10-12, the opinion of the court by Hon. Justice Holmes is quoted in full.

Fifth.

The Michigan Act for the regulation of common carriers (Act 300 Public Acts 1909, p. 704; 2 C. L. 1915, Sections 8109-8163, pp. 2906-2939) is fair on its face, but as construed and applied by the State Supreme Court in its said opinion by Justice Ostrander and which opinion and decision is binding on the Supreme Court of the Unted States, it is in conflict with the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment of the constitution of the United States in the following among other particulars:

Rightly construed the complaint of F. W. Gilchrist, the Churchill Lumber Company, and the Island Mill Lumber Company, on which the orders of October 22nd and November 3rd, 1909, were granted, did not charge that the rates specified in the tariff of the railroad company M. R. C. 205 were of themselves unreasonable; it only charged discrimination in favor of Cheboygan and against Alpena, and no competent or material evidence was introduced before the Michigan Railroad Commission tending to show that said rates were of themselves unlawful, unjust or unreasonable.

This objection would have been eliminated if the Circuit Court for the County of Wayne on the bill filed by the railroad company under Section 22 of the act, and the Supreme Court of the State on the appeal to it under Sec. 26 of the act had not been limited and restricted to the question whether said rates were confiscatory and refused to pass on the naked question of their reasonableness; and making use of the orders of the commission as prima facie evidence that the rates ordered by the commission were reasonable
473 and just, examined the proofs introduced by the railroad company with evil and hypercritical eyes, and in that way sustained and confirmed the orders of the Commission.

The Detroit & Mackinac Railway Company says that as construed and applied by the Michigan Railroad Commission, by the Circuit Court for the County of Wayne, and by the Supreme Court of Michigan, the said act deprives the Detroit & Mackinac Railway Company of its rights and property without due process of law and is a denial by the state of that equal protection of the laws guaranteed by the Fourteenth Amendment of the constitution of the United States.

The case of the Fletcher Paper Company was tried in the Bay Circuit Court, but by stipulation (Record pp. 54-59) the cause of the Island Mill Lumber Company, the Richardson Lumber Company, the Churchill Lumber Company and the Michigan Veneer Company were submitted to the court at the same time, and said cases were to abide the result in the case of the Fletcher Paper Company.

The five judgments entered November 27th, 1916, are as follows:

Fletcher Paper Company.....	$25,788.66	$90.50	$25,879.16
Island Mill Lumber Company..	24,534.33	77.50	24,611.83
Richardson Lumber Company..	28,239.65	79.15	28,318.80
Churchill Lumber Company....	14,336.13	76.50	14,412.63
Michigan Veneer Company....	16,058.19	64.70	16,122.89
Grand Total.....			$109,345.31

Included in the judgments in these cases the plaintiffs recovered the rebate of fifty cents per thousand feet of logs, in addition to the difference between the log rates collected by the railroad company and those prescribed by the railroad commission.

Fletcher Paper Company, 20,481,619 feet.....	$10,240.00
Island Mill Lumber Company, 22,514,642 feet.....	11,257.00
Churchill Lumber Company, 21,685,371 feet.....	10,842.00
Richardson Lumber Company, 16,680,379.....	18,340.00
Michigan Veneer Company, 4,648,964 feet.....	2,324.00
	$43,003.00

A single supersedeas bond running to the five obligees, jointly or severally, in the sum of One Hundred Fifty Thousand $150,000.00) Dollars is offered, or separate bonds for each plaintiff as requested by Mr. Edward S. Clark, counsel for the plaintiffs as follows:

474	Fletcher Paper Company.....	$34,000.00
	Richardson Lumber Company.....	38,000.00
Island Mill Lumber Company.....		32,000.00
Churchill Lumber Company		19,000.00
Michigan Veneer Company.....		8,000.00
		$131,000.00

The Supreme Court of Michigan is composed of eight justices, the justice whose term of office soon expires being the Chief Justice, and if the terms of two expire at the same time, the senior in years serves one year and the junior in years serves the next year. (2 C. L. 1915, Sec. 12010, p. 4278).

Three of the Justices, Kuhn, Bird and Fellows had served as Attorney General, and as the official legal counsel of the Michigan Railroad Commission, in the litigation with the Detroit & Mackinac Railway Company, and they were disqualified to sit in the case.

The case was heard by Justices Stone, Steere, Ostrander, Moore and Brooke, Justice Stone, the senior in years, presiding as Chief Justice pro tem. Your petitioner first applied to Chief Justice Kuhn for the allowance of a Writ of Error and the approval of a supersedeas bond, but he regarded himself as disqualified and refused to entertain the application.

The petition was then submitted to Justice Stone as the presiding

Justice of the five justices who heard and decided the case, but he deferred to Justice Ostrander, who wrote the opinion of the court and thought the application should be made to an associate Justice of the Supreme Court of the United States.

Wherefore your petitioner prays that the Hon. William R. Day, Associate Justice of the Supreme Court of the United States, allotted to the sixth Circuit, will allow the Writ of Error prayed and approve of a supersedeas bond or bonds according to the statutes of the United States in such cases made and provided.

JAMES McNAMARA,
HENRY & HENRY,
General Counsel and Attorneys for the Detroit & Mackinac Railway Company.

FRED A. BAKER,
Of Counsel.

Dated at Detroit, Michigan, November 27th, 1917.

475 UNITED STATES OF AMERICA, *ss:*

To Fletcher Paper Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Michigan, wherein Detroit & Mackinac Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this twenty-sixth day of December, in the year of our Lord one thousand nine hundred and seventeen.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

As attorney for the defendant in error as herein named I acknowledge and accept service of the foregoing citation at Bay City, Michigan this 2nd day of January, 1918.

EDWARD S. CLARK.

475½ On this 4th day of January, in the year of our Lord one thousand nine hundred and eighteen, personally appeared Carl R. Henry, before me, the subscriber, a Notary Public in and for Alpena County, State of Michigan, and makes oath that he delivered a true copy of the within citation to Edward S. Clark, attorney for the defendant in error, the Fletcher Paper Company, by

so delivering to him such true copy on the 2d day of January, 1918, at the city of Bay City and State of Michigan.

CARL R. HENRY.

Sworn to and subscribed the 4th day of January, A. D. 1918.

MARIE REINKE,
Notary Public in and for Alpena County, Michigan.

My Commission expires August 30th, 1920.

STATE OF MICHIGAN,
County of Alpena, ss:

On this 4th day of January, in the year of our Lord one thousand nine hundred and eighteen, personally appeared Carl R. Henry, before me, the subscriber, a notary public in and for Alpena County, State of Michigan, and makes oath that he delivered a true copy of the within citation to Allan M. Fletcher, President of said Fletcher Paper Company, by so delivering to him such true copy, on the 4th day of January, A. D. 1918, at the city of Alpena, County of Alpena, and State of Michigan.

CARL R. HENRY.

Sworn to and subscribed the 4th day of January, A. D. 1918.

[SEAL.] MARIE REINKE,
Notary Public in and for Alpena County, Michigan.

My commission expires August 30th, 1920.

Copy.

476 Know all men by these presents, that we, the Detroit and Mackinac Railway Company, a Michigan corporation, as principal, and the National Surety Company of New York, as surety, are held and firmly bound unto the Fletcher Paper Company, a Michigan corporation in the full and just sum of Fifty-two ($52,000) Thousand Dollars, to be paid to the said Fletcher Paper Company, its certain attorney, successors or assigns; to which payment, well and truly to be made, we bind ourselves, and successors, jointly and severally by these presents. Sealed with our seals and dated this 22d day of December, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a session of the Supreme Court of Michigan, in a suit depending in said court between the Fletcher Paper Company as plaintiff and appellee and the Detroit and Mackinac Railway Company as defendant and appellant, a judgment was rendered against the said Detroit and Mackinac Railway Company for $25,879.16, and the said Detroit and Mackinac Railway Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Fletcher Paper Company, citing

and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now the condition of the above obligation is such that if the said Detroit and Mackinac Railway Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

DETROIT & MACKINAC RAILWAY COMPANY,
[SEAL.] By J. D. HAWKES,
Vice Pres. & Gen'l Mgr.

Sealed and delivered in presence of
FRED A. BAKER,
FORREST CURTIS.

NATIONAL SURETY COMPANY,
[SEAL.] By W. H. RONSAVILLE,
Attorney in Fact.

Approved by WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

477 STATE OF MICHIGAN:

Supreme Court.

No. 27863.

FLETCHER PAPER COMPANY, Plaintiff and Defendant in Error,

vs.

DETROIT AND MACKINAC RAILWAY COMPANY, Defendant and Plaintiff in Error.

Assignment of Errors.

The Detroit and Mackinac Railway Company, plaintiff in error, in connection with its petition for the allowance of a writ of error from the Supreme Court of the United States, makes the following assignment of errors, which it says appear, in the record and proceedings, and in the judgment of the Supreme Court of Michigan, affirming the judgment of the Circuit Court for the county of Bay, in favor of the Fletcher Paper Company, as plaintiff, and against the Detroit and Mackinac Railway Company as defendant.

On the 19th and 22d days of October, 1909, and the 3d day of November, 1909, the Michigan Railroad Commission made certain orders requiring the Detroit and Mackinac Railway Company within twenty days after the service upon it of a copy of the orders, to file and publish tariffs reducing from what they then were, its rates for switching charges between the City of Alpena and Broad-

well's Dam, and its rates for the transportation of logs in carload lots from its logging spurs or branches to the City of Alpena. The twenty days expired November 26, and 27, 1909. The Detroit and Mackinac Railway company did not comply with said orders, within the twenty days or thereafter, until the 15th day of February, 1915, at the end of protracted litigation; and during the whole period of more than five years it continued to collect its old rates.

478 April 3, 1915 the Fletcher Paper Company, the Island Mill Lumber Company, the Richardson Lumber Company, the Churchill Lumber Company, and the Michigan Veneer Company, each commen-ed an action in the circuit court for the Conty of Bay, against the Railroad company, by filing and serving a declaration containing the common counts in assumpsit and a special count, seeking to recover the difference between the rates exacted, by the railroad company and the rates prescribed by the orders of the railroad commission.

The Bay Circuit Court rendered judgments in their favor, and the judgments were affirmed by the Supreme Court of the State.

The Detroit and Mackinac Railway Company as plaintiff in error says that the Supreme Court of Michigan erred in the following particulars:

1. At the trial of the cause before the circuit court, for the county of Bay, counsel for the plaintiff offered in evidence an order of the Michigan Railroad Commission in the words and figures following, to-wit:

479 STATE OF MICHIGAN:

Before the Michigan Railroad Commission.

Session of the Michigan Railroad Commission held at its offices in the city of Lansing, on the 19th day of October, A. D. 1909.

D–188.

F. W. GILCHRIST, CHURCHILL LUMBER COMPANY, ISLAND MILL COMPANY, Complainants,

vs.

DETROIT & MACKINAC RAILWAY COMPANY, Defendants.

Complaint having been made by the above named complainants charging that the above named defendant by its public tariff now in effect for the transportation of logs to the city of Alpena, state of Michigan, is charging rates that are unjust, and discriminatory, and issue having been joined thereon by the said parties and a hearing having been had wherein the parties were present and represented by counsel, and the evidence and arguments of counsel having been duly considered by the commission, the commission

doth find that the matters alleged in the complaint are substantially true and that the rates charged for the transportation of logs in carload lots to said city of Alpena are unjust, unreasonable and excessive, and that said rates should be reduced as hereinafter set forth;

Now, therefore, by virtue of the authority vested in us by law, it is hereby ordered that the Detroit and Mackinac Railway Company do publish, file and put into operation so as to become effective twenty (20) days from the date of the service of this order on defendant, a tariff for the transportation of logs in carload lots to the said city of Alpena as follows:

Ten (10) miles or less not to exceed one dollar ($1.00) per thousand (1,000) feet;

Over ten (10) miles and not exceeding twenty (20) miles, not to exceed one dollar and thirty-three cents ($1.33) per thousand (1,000) feet;

Over twenty (20) miles and not exceeding thirty (30) miles, not to exceed one dollar and sixty-seven cents ($1.67) per thousand (1,000) feet;

480 Over thirty (30) and not exceeding fifty (50 miles, not to exceed two dollars ($2.00) per thousand (1,000) feet;

Over fifty (50) and not exceeding eighty (80) miles, not to exceed two dollars and thirty-three cents ($2.33) per thousand (1,000) feet;

Above rates to apply when the manufactured product is reshipped via defendant company's line, and when not so to be reshipped, that defendant company are authorized to collect in addition to said rate fifty cents (50c) per thousand (1,000) feet, but if later reshipment is made over defendant company's line, they are to refund to each shipper the fifty cents (50c) per thousand (1,000) feet collected, and,

It is further ordered, that the books of both defendant company and complainants (and all other shippers of logs affected by this order), shall show plainly the total of inbound shipments and the reshipment of the manufactured product; and,

It is further ordered, that these rates apply to all classes of logs transported by said defendant to said city of Alpena, within the distance above set forth.

GEORGE W. DICKINSON,
JAMES SCULLY,
Commissioners.

Counsel for defendant made the following objection to the introduction of said order in evidence:

Mr. Baker: I object to that order on the ground that there was no complaint to the Michigan Railroad Commission that the rates to Alpena on logs were unjust, unreasonable and excessive, and that there was no hearing on any such allegation before the Railroad Commission, no evidence was introduced to show that the rates to Alpena were unjust, unreasonable and excessive, the complaint in that case related exclusively to the discrimination in favor of ship-

ments as against Alpena, and I insist that to sustain this order and grant the plaintiff any relief on this order would be a violation of the due process of law — of the fourteenth amendment, and of the same clause in our own constitution. I also make the objection that the provision in this order for a fifty cent refund was an improper rebate and discrimination in favor of the Fletcher Paper Co., and is absolutely void in and of itself, a violation of the Michigan act. Our position in regard to that is that all shippers living in Alpena are entitled to the same rate, regardless of what they do with their products.

The Court: It may be received for the present. (Exhibit read.)

481 And the plaintiff in error say- that the Supreme Court of Michigan erred in affirming said ruling.

2. At the close of the testimony for the plaintiff counsel for defendant moved the court to dismiss the plaintiff's case and on eighteen different grounds (Record pp. 184-199). After arguments by counsel the court took the motion to dismiss under advisement and subsequently denied the motion (Record p. 210). And the plaintiff in error says that the Supreme Court of Michigan erred in affirming said ruling.

3. The motion to dismiss having been argued and submitted counsel for defendant made an offer of proofs (Record pp. 199-203).

482 *Offer of Proofs.*

Mr. Baker: I want to make an offer to prove, an offer of evidence. I offer to prove that the property of the Detroit & Mackinac Railway Company, devoted to public use, June 30, 1910, was of the value of $5,636,844.86, and on June 30, 1914, it was of the value of $5,709,816.61, and in that connection we will prove that the Detroit & Mackinac Railway Company is entitled to earn on said values at least 8 per cent, and if said values are reduced to the lowest possible estimate at which they can be figured or ascertained it is entitled to earn 10 per cent. We will prove that during the years ending July 30, 1910, 1911, 1912, 1913, 1914 and 1915 down to February 8th, the Detroit & Mackinac Railroad collected three dollars a thousand on logs brought from as far north as Millersburg and three dollars and a quarter a thousand for logs brought beyond Millersburg to Alpena, and that the total shipments were over a hundred million feet, and if the rates fixed by the Commission had been applied the total loss would have been over $136,000 those five years with an additional loss of in the same proportion for the sixth year.

We have actual evidence put in here where they tried to prove—it is a mere question of computation.

We further will show that during said years the Detroit & Mackinac Railway Company in its financial statements and annual reports charged a certain amount to depreciation, which it was required to do as a business proposition, and by the rules and regulations of the

Interstate Commerce Commission, and by Section 6553 of the Howell's Statutes, 2nd edition, page 2655. In 1910 the rail depreciation was $73,093.43, steam locomotive, $12,706.56, passenger train cars $11,675.16, freight cars, $34,529.72, work equipment, $668.04, or a total depreciation in that year of $132,662.99. In 1911 the rail depreciation was $60,000, steam locomotives, $12,373.60, passenger train cars $10,973.60, freight train cars, $32,461.80, work equipment, $627.96, a total for that year of $116,436.92.

In 1912 the rail depreciation was $39,380, steam locomotives, $11,631.12, passenger train cars, $10,316.16, freight train cars, $30,514.08, work equipment, $590.28, a total of $92,531.64.

For the year ending June 30, 1913 nothing was charged off for depreciation, and for the year ending June 30, 1914 nothing was charged off for depreciation, and for the year ending June 30, 1915, $26,876.44 was charged off for depreciation.

We will further show that this depreciation account if spread over the five or six years would annually amount to $68,328.31.

We will further show that the total income of the Railroad Company during the five years from 1910 to 1914 inclusive was $6 299,549.47, or an average of $1,259,904.98.

The operating expenses were $4,585,944.48, or an average of $957,118.89. The net income was $1,513,604.99, or an average of $302,720.50.

If the rates of the Commission had been applied the average would have been less by a large amount, to wit: $27,200. And in that connection, we will show that on the lowest possible estimate of the value of the property the Railroad Company was entitled to earn over three hundred thousand dollars a year, if you put the valuation at five million, as Judge Murfin did, and 6 per cent on it would be three hundred thousand dollars, and if you put it at six million it would be three hundred and sixty thousand dollars, and of course, as I look at it, the way the property is valued and the rate to be fixed depended somewhat on each other, that is, if you screw the valuation right down on the lowest possible estimate they are entitled to a higher rate, they are entitled to the current rates that prevail in the same region, and it could not be less than 8 per cent, and up here north of Bay City, up in that country, I guess 10 per cent is the current rate that everybody has to pay.

Now, I point these facts out as part of our full proofs to show that whatever deduction on every item they are claiming to recover here would reduce the income of the Railroad Company below what it is entitled to earn under the decisions, and that it would be a reduction of the net income lower than what the Company is entitled to earn.

If your Honor will take this case into consideration and pass on the motion to dismiss on the legal objections we have raised to it it will not be necessary for the defendant to put in any evidence, but if you sustain plaintiff's case in any particular whatever then we ask leave to make these proofs and we will do so now if you say so. It will take about a week and we will put them in, so that we do not finally submit our case until we have a chance to put in such proofs

as the Court may think it is necessary to put in, that is, if you hold they have got some kind of a case then we want to put this in evidence. You are agreeable to that, aren't you?

Mr. Clark: I would prefer to argue this before the evidence goes in. I think I can convince Judge Coumans that this evidence would be incompetent, and if he so rules of course we would save a week's work. It is better to get his ruling on that point before the evidence is submitted, of course.

The Court: You want to argue the proposition?

Mr. Clark: Yes.

Mr. McNamara: This is on a motion to dismiss now, and I suppose what Mr. Baker said would come up more properly after the motion to dismiss.

Mr. Clark: Well, it is wise, I think, to make the motion now so I can cover it now in my argument.

The Court: Yes, they may both be submitted.

Arguments were made by counsel on the motion to dismiss, on motion to submit additional proofs as outlined by Mr. Baker, on motion requiring plaintiff to elect on what counts it relied in its declaration, on the question of the plaintiff's right to recover and if so from what date, on the question of the effect of the decision of Judge Collins in overruling defendant's demurrer, and the question of the plaintiff's right to double damages, and on every other question raised by the record, files, pleadings and evidence upon which counsel desired to be heard.

At the conclusion of the arguments the trial court took the whole controversy under advisement, stating that he would decide the various questions by a written opinion.

483 The court rejected and excluded the proofs so offered. (Record p. 209, at bottom). And the plaintiff in error says that the Supreme Court of Michigan erred in affirming said ruling.

4. November 13, 1916, the court Hon. L. P. Coumans Circuit Judge filed an opinion with findings of fact and conclusions of law, (Record pp. 206-212). And the plaintiff in error says that the Supreme Court of Michigan erred in affirming said opinion, findings of fact, and conclusions of law.

5. November 16, 1916, counsel for defendant filed exceptions to the opinion and findings of fact and of law (Record pp. 213-215). These exceptions were overruled by the court. And the plaintiff in error says that the Supreme Court of Michigan erred in affirming said ruling.

6. November 22, 1916 counsel for defendant pursuant to Circuit Court rule 45, and the Statute in such case made and provided, filed exceptions to said opinion and requested *to* court to pass specially on forty-four questions of law and fact. (Record pp. 215-232)

484 Some of these questions were refused without comments and some with comments. The response and action of the court on each of said requests was filed November 27, 1916. (Record pp. 246-250)

And the plaintiff in error says that the Supreme Court of Michigan erred in affirming the response and action of the Bay Circuit Court on each of said requests.

7. The defendant made a motion for a new trial, based on the legal questions that had arisen in the case, and also on the testimony of James McNamara taken in the similar case of Frank W. Gilchrist, against the Detroit and Mackinac Railway Company, in the Alpena Circuit (Record pp. 265-296).

Judge Coumans' term having expired the motion for a new trial was heard before his successor, Hon. Samuel G. Houghton, Jan. 29, 1917. (Record p. 297). Counsel for plaintiff consented "that the newly discovered evidence, the testimony of Mr. McNamara in Alpena in the trial of the Gilchrist case, and the exhibits referred to by him may go into the record as a part of the motion for a new trial," etc. Record p. 302.)

Judge Houghton rendered a decision denying the motion for a new trial February 26, 1917 (Record pp. 307-309.)

Counsel for defendant filed exceptions to the denial of the motion for a new trial (Record pp. 309-310.)

And the plaintiff in error says that the Supreme Court of Michigan erred in affirming the ruling of the Bay Circuit denying the motion for a new trial.

8. Counsel for defendant settled a bill of exceptions and filed an assignment of errors, alleging 101 errors (Record pp. 312-350.)

Judge Houghton's certificate thereto was signed, April 16, 1917 (Record p. 351.)

485 And the plaintiff in error says that the Supreme Court of Michigan erred in overruling all of said assignment of errors, and in affirming the judgments below.

Plaintiff in error claims the benefit of the assignments of error in the court below with the like force and effect as if the same were here repeated.

9. September 27, 1917, the opinion of the Supreme Court of Michigan by Mr. Justice Ostrander was filed and is a part of the record to be returned in obedience to the writ of error.

And the plaintiff in error says that the Supreme Court of Michigan erred in its said opinion in affirming the judgments below, and in those parts of said opinion, which read as follows:

(1.) "(2, 3) It is clear, I think, that plaintiffs have no statute remedy, and that the statute does not seek to interfere with or amend the remedy at common law. Plaintiffs base their actions precisely upon the action of the Commission. Everything essential to a recovery, so far as the character of the exaction is concerned, has been determined by the Commission, whose determination they rely upon. If it were otherwise, if the charges exacted by the defendant had been duly fixed according to the act and approved by the Commission, and they were attacked, a different question would be presented. In such a case, the Commission, and not the courts, should be first applied to. In the first place, the Commission is the ratemaker; in the second place, it would be wholly incongruous from an

administrative standpoint to have successive juries or different courts and judges, passing upon the reasonableness of a rate already fixed by the Commission. To this effect are the decisions in Texas & Pac. Ry. v. Abilene Cotton Oil Co. 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Robinson v. Balt. & O. R. R. 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288; Gimbel Bros. v. Barrett (D. C.) 215 Fed. 1004). These cases are authority, also, for the rulings of the trial court refusing to receive and consider offered evidence, and denying defendant the right to try out in these cases the question of the reasonableness of the exactions it made."

(2.) "(4) Defendant does, indeed, say that the charges made by it were once approved, and were published as its rates, and, until suspended, were lawful rates; this as a part of an argument which asserts that only the voluntary action of the carrier or the 486 writ of mandamus can put into operation rates fixed by the Commission. It makes little difference whether we do or do not say that the new rates were in effect, or whether we say they were in effect, but not in operation. The old rates were condemned as unreasonable, and the new ones approved as reasonable by the Commission, action which is now, and was when these suits were begun, conclusive upon defendant."

(3.) "Instead of publishing and collecting the rates fixed by the Commission, defendant sought and obtained an injunction restraining the Commission from putting into operation its said orders. The statute plainly recognizes the authority of a court of equity to so suspend the operation of the orders of the Commission. The case of the defendant is not, however, that of one prevented from doing something, pleading the prevention in excuse, or bar, of the consequences of its enforced nonaction. On the contrary, it is pleading its own action, pleading the injunction it sought for and secured upon representations held to be unfounded, as an excuse for retaining an exaction at all times prima facie unlawful, and finally, in its own suit, conclusively determined to be unlawful. The temporary injunction permitted defendant, notwithstanding the orders of the Commission, to continue to take what its published tariffs called for, but it is not apparent, and is not pointed out, how it legalized the exaction."

(4.) "(5) It will be perceived that the order of the Commission fixed freight rates to apply when manufactured product is reshipped via defendant's line, and, when not so reshipped the defendant is permitted to collect 50 cents per thousand feet additional, to be refunded, however, if shipper later ships out the manufactured product or some of it. Ambiguous the order in some respects is, but not, I think, in respect to the rate. The order made a rate of $1 a thousand for logs in carloads moving 10 miles or less, and varying rates as the distance was increased. To them defendant was permitted to add 50 cents a thousand, no matter what the length of haul, if the product was not shipped out by its line. Defendant could take nothing from these rates. What it did was to enforce its old tariff of $3 and $3.25 per thousand feet, which tariff contained the pro-

vision for a refund of 50 cents per thousand when an 'equal amount of manufactured product' was shipped out over its line. Defendant says that;

'The rebates offered by the railroad company and the provision to the same effect in the order of the Railroad Commission'

—are a plain violation of the act. If a rebate was intended,
487 or was provided, for a discrimination in favor of particular shippers, no difference of opinion would exist. This provisions was not questioned in the bill filed by the defendant. In my opinion, there is no rebate, no discrimination, provided for in the order. A uniform rate is established, and with it a milling in transit rate, not necessarily unlawful and not shown here *it* be unlawful. Watkins on Shippers and Carriers (2d Ed.) Sec. 169; Transp. of Wool, Hides, and Pelts, 23 Interst. Comm. Com'n R. 151: Transit Case 24 Interst. Com. Com'n. R. 340P Laurel Mills v. Railroad Co., 84 Miss. 349; 37 South. 134, 66 L. R. A. 453. The statute, section 11, reads:

"Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions."

10. The plaintiff in error further says; that it is manifest on the records and proceedings aforesaid and the judgments and opinion of the Supreme Court of Michigan, that act No. 300 of the Public Acts of Michigan, of 1909, as construed and applied in these cases is in conflict with the Fourteenth Amendment of the constitution of the United States in that the Detroit and Mackinac Railway Company is thereby deprived of its rights and property without due process of law, and is denied the equal protection of the laws.

11. Plaintiff in error further says that the Supreme Court of Michigan in its said opinion makes this statement;

"It is clear, I think, that the plaintiffs have not statute remedy and that the statute does not seek to interfere with or amend the remedy at common law."

Whereas, in truth and in fact subdivision (*g*) of section 10 of Act 300, of the Public Acts of Michigan of 1909, as amended, (2. Comp. Laws, 1915, sec. 8118 P. 2916-2918) expressly provides a statute remedy which in the very nature of its provisions excludes and repeals the common law remedies for the recovery of excessive freight charges by common carriers; it was adopted from like
488 provisions in the interstate commerce act after they had acquired a well understood and well known meaning in virtue of decisions by the Supreme Court of the United States, and were included in the Michigan Act with the same meaning; but the Supreme Court of Michigan, in its said opinion, refused or failed to see, that the said plaintiffs had an efficient statutory remedy if they had seen fit within six months after the payment of an exces-

sive freight charge to complain to the railroad commission that the charge exacted was irregular or exorbitant, that is, unlawful or unreasonable; and on which complaint a hearing would have been had, and a decision rendered which would have protected, the rights of the complainant and of the carrier.

And the plaintiff in error says that the said act of the legislature, although fair on its face, was so construed and applied, by the Michigan Railroad Commission and by the Bay Circuit Court, and by the Supreme Court of the state, in its said opinion, with minds so unequal and oppressive as to amount to a practical denial by the state of the equal protection of the laws in violation of the Fourteenth Amendment of the constitution of the United States.

12. The plaintiff in error further says that the Supreme Court of the United States is bound by the construction of the statute by the state court, and as construed and applied by the Supreme Court of Michigan in its said opinion, it deprives the Detroit and Mackinac Railway Company of its right to a judicial investigation of the reasonableness of the freight charges and rates collected by it from the said plaintiffs, and it is in conflict with the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

13. The plaintiff — error further says that while its railroad is wholly within the state of Michigan, and it does an intra-state business thereon, yet, it is also engaged in an interstate business
489 and transports freight in carload lots to Ohio and other states of the United States and to the Dominion of Canada, and as to all such traffic it is subject to the interstate commerce act, and to the rules and regulations of the Interstate Commerce Commission; that large shipments of paper by the Fletcher Paper Company, and of lumber and veneer in carload lots by the other plaintiffs are made in such interstate and foreign traffic and commerce and the same being subject to the interstate commerce act and to the rules and regulations of the Interstate Commerce Commission, the said act of the Michigan legislature as construed and applied by the Supreme Court of the State in its said opinion, conflicts with a regulation of interstate commerce established by Congress in virtue of its constitutional power and authority over interstate commerce, in this that congress has said in the act of February 19, 1903, 32 Statutes at Large 847, commonly called the Elkins act, that

"It shall be unlawful, for any person, persons or corporations to offer, grant, or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce, by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereto or whereby any other advantage is given or discrimination is practiced."

So that if the Detroit and Mackinac Railway Company pays the rebate of fifty cents per thousand feet of logs, sustained by the Supreme Court of Michigan, as a milling in transit rate, it and its officers and agents and servants, will be subject to punishment by heavy fines or imprisonment or both, imposed by said Elkins act.

And the plaintiff in error assigns as error, that part of the opinion of the Supreme Court of Michigan which sustains said fifty cent rebate as valid, as being in conflict with a regulation to the contrary established by congress under its paramount constitutional
490 power and authority.

Amendments, other than the one above mentioned but to the same effect, were made to the interstate commerce act by the act of June 29, 1906, 34 Statutes at Large, 586, Sec. 2, commonly called the Hepburn Act, amending Sec. 6 of the original act.

The decisions of the Interstate Commerce Commission cited by Justice Ostrander for the Supreme Court of Michigan do not sustain the conclusion reached by that court, and if they may be so regarded, they are overruled by Lehigh Valley R. R. Co. v. United States 243 U. S. 444.

14. The plaintiff in eror says that in its plea and notice making a defence to the declaration of the plaintiffs in the Bay Circuit Court it invoked the protection of the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment of the Constitution of the United States, and specially reiterated its claim to such protection in the second and sixteenth paragraphs of the amended plea and notice (Record pp. 35, 36, 37, 45).

All of the protection so claimed was rejected and denied by the Bay Circuit Court, in rendering the judgments in favor of the Fletcher Paper Company, and the other plaintiffs.

And the plaintiff in error says that the Supreme Court of Michigan erred in affirming the said rulings and judgments of the Bay Circuit Court.

Wherefore, the plaintiff in error prays that the judgments of the Supreme Court of Michigan in the said cases may be reversed and that said Supreme Court may be directed to enter orders and judgments, reversing the said judgments of the Circuit Court for the County of Bay, in said cases.

JAMES McNAMARA,
Counsel for the Detroit and Mackinac Railway Company, the Plaintiff in Error.

491 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable
[SEAL.] the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between

Detroit & Mackinac Railway Company, appellant, and Fletcher Paper Company, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Con-
492 stitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Detroit & Mackinac Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-sixth day of December, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

493 To the Supreme Court of the United States of America:

The execution of the within Writ appears by the transcript of the Record hereto annexed.

JAY MERTZ,
Clerk of the Supreme Court of Michigan.

Lansing, Michigan, Jany. 9th, 1918.

[Endorsed:] Supreme Court of the United States. October Term, 1917. Detroit & Mackinac Railway Company, Plaintiff in Error, vs. Fletcher Paper Company. Writ of Error.

494 Supreme Court of the State of Michigan.

DETROIT & MACKINAC RAILWAY COMPANY, Plaintiff in Error,

vs.

FLETCHER PAPER COMPANY, Defendant in Error.

IN THE SUPREME COURT, *ss:*

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and exhibits, and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Justices of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the Writ of Error, the Writ of Error with allowance endorsed thereon, the citation with acceptance of service endorsed thereon by the attorney for the adverse party, together with proof of service thereof on defendant in error, a copy of the bond duly approved, together with the assignments of error, with the prayer for reversal in the Supreme Court of the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this 9th day of January, in the year of our Lord one thousand nine hundred and eighteen.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
Clerk of the Supreme Court of Michigan.

Endorsed on cover: File No. 26,292. Michigan Supreme Court. Term No. 825. Detroit & Mackinac Railway Company, Plaintiff in Error, vs. Fletcher Paper Company. Filed January 24th, 1918. File No. 26,292.

OF THE

Supreme Court of the United States

October Term, 1916.

No. 326.

DETROIT & MACKINAC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

PETOSKEY PAPER COMPANY, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Michigan.

BRIEF FOR

INDEX.

	PAGE	PAGE	PAGE
Motion to Dismiss, Affirm or Transfer to Summary Docket			1- 2
Notice of Motions			2
Proof of Service			2- 3
Statement of the Facts and Objects of the Motions			4-15
Analysis of Questions Involved		7-15	
Analysis of Assignments of Error	7-10		
Analysis of Decisions of Michigan Supreme Court	10-13		
Analysis of Questions now before this Court	14-15		
Argument of Motion to Dismiss			16-19
Argument of Motion to Affirm			20-27
I. Effectiveness of Freight Rate Fixed by Michigan Railroad Commission		20-22	
II. Questions of Pleading and Practice		22	
III. Plaintiff's Right to Re-open the Question of the Reasonableness of the Rates		22-23	
IV. The Validity of the Provision for the Fifty-cent Differential		23-26	
V. Validity of Original Proceedings Before Michigan Railroad Commission		26-27	
VI. Construction of Michigan Statute		27	
Argument of Motion to Transfer to Summary Docket			27

List of All Cases Referred To.

	PAGES WHERE CITED
Arkansas R. R. Rate, 168 Fed., 720	22
Bellamy v. Railway Co., 220 Fed., 876	22
Bethell v. Demaret, 10 Wall., 537	18
Central Land Co. v. Laidley, 159 U. S., 103	19
Commercial Bank v. Buckingham, 5 How., 317	19
Detroit & Mack. Ry. Co. v. Mich. R. R. Comm., 171 Mich., 335	4, 20, 22
Detroit & Mack. Ry. Co. v. Mich. R. R. Comm., 203 Fed., 864	4
Detroit & Mack. Ry. Co. v. Mich. R. R. Comm., 235 U. S., 402	4, 22, 27
D. & M. Ry. Co. v. Mich. R. R. Comm., 240 U. S., 564	20
Ferry v. King County, 141 U. S., 668	19
French v. Taylor, 199 U. S., 274	18
Grand Gulf R. Co. v. Marshall, 12 How., 165	19
Ireland v. Woods, 246 U. S., 323	19
Laurel Mills v. R. R. Co., 84 Miss., 349	26
Mich. C. R. Co. v. Circuit Judge, 156 Mich., 459	20
Mich. R. R. Comm. v. D. & M. Ry. Co., 178 Mich., 230	20
Mich. R. R. Comm. v. D. & M. Ry. Co., 182 Mich., 234	4
Mich. R. R. Comm. v. D. & M. Ry. Co., 184 Mich., 242	4
Mich. R. R. Comm. v. D. & M. Ry. Co., 185 Mich., 649	4
Mich. R. R. Comm. v. M. C. R. R., 159 Mich., 580	20
Pac. Gas & Elec. Co. v. San Francisco, 211 Fed., 202	21
Phil. & R. Coal & I. Co. v. Gilbert, 245 U. S., 162	18
Ross v. Oregon, 227 U. S., 150	19
Spring Valley Water Co. v. San Francisco, 165 Fed., 667	21
State v. Ry. Co., 265 Mo., 646	22
Stedelman v. Miner et al., 38 Sup. Ct. Rep., 359	18
Yick Wo v. Hopkins, 118 U. S., 373	19

IN THE

Supreme Court of the United States

October Term, 1918.

No. 336.

DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
v.
FLETCHER PAPER COMPANY, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Michigan.

MOTION TO DISMISS, AFFIRM, OR TRANSFER TO THE SUMMARY DOCKET.

Now comes the above named defendant in error, by its counsel herein, and moves this honorable court:

1. To dismiss the writ of error herein on the ground that this court has not jurisdiction thereof.

2. To affirm the judgment of the Supreme Court of the State of Michigan, on the ground that it is manifest that this writ was taken for delay only, and that the questions on which the decision of the cause depend are so frivolous as not to need further argument.

3. If this court shall refuse to dismiss or affirm, then to transfer this cause for hearing to the summary docket, because the cause is of such a character as not to justify extended argument.

A brief statement of the facts and objects of this motion is filed herewith and made a part hereof.

Edward S. Clark,
Counsel for Defendant in Error.

NOTICE OF MOTIONS.

To Detroit & Mackinac Railway Company,

Plaintiff in Error:

You are hereby notified that the defendant in error in the above entitled cause will, on Monday, October 7, 1918, at the meeting of the Supreme Court of the United States, on that day or as soon thereafter as counsel can be heard, submit for the consideration of said court, the foregoing motions and each of them, and the brief in support thereof hereto annexed, all of which are now served upon you herewith.

Yours, etc.,

Edward S. Clark,
Counsel for Defendant in Error.

State and Eastern District of Michigan, } ss.
County of Bay.

Laura Kennedy, of Bay City, Michigan, being duly sworn, deposes and says that on the 15th day of August, 1918, she served a motion to dismiss, affirm or transfer to the summary docket, of which the annexed is a true copy, together with the statement and brief of defendant in error in support thereof, a true copy of which is also hereto annexed, upon James McNamara, Fred A. Baker and Charles R. Henry, counsel for plaintiff in error, by carefully enclosing a copy thereof in a sealed envelope, plainly addressed to said McNamara, at 2026 Dime Bank Building, Detroit, Michigan, another copy thereof in a separate sealed envelope, plainly addressed to said Baker, at 526 Dime Bank Building, Detroit, Michigan, and another copy thereof, in a separate sealed envelope, plainly addressed to said Charles R. Henry, at Alpena, Michigan (the addresses so used being the business addresses of each respectively), and depositing each of said envelopes in the United States postoffice, in the city of Bay City, Michigan, with postage fully prepaid; the same being so deposited as to reach each of said addresses in due course of mail, more than three weeks prior to October 7, 1918.

Laura Kennedy.

Sworn to and subscribed before me, this 15th day of August, 1918.

Jessie Thompson,
Notary Public in and for
Bay County, Michigan.

My commission expires April 16, 1919.

STATEMENT OF THE FACTS AND OBJECTS OF THIS MOTION.

This case is an outgrowth of litigation reported as:

Detroit & Mackinac Railway Co. v. Michigan Railroad Commission, 171 Mich., 335.
Detroit & Mackinac Railway Company v. Michigan Railroad Commission, 203 Fed., 864.
Detroit & Mackinac Railway Company v. Michigan Railroad Commission, 235 U. S., 402.
Michigan Railroad Commission v. Detroit & Mackinac Railway Company, 182 Mich., 234.
Michigan Railroad Commission v. Detroit & Mackinac Railway Company, 184 Mich., 242.
Michigan Railroad Commission v. Detroit & Mackinac Railway Company, 185 Mich., 649.

The litigation resulted from certain orders of the Michigan Railroad Commission made in October and November, 1909. These orders involved switching charges and freight rates to Alpena, a city in the northern part of the lower peninsula of Michigan. The rates and charges in question applied only to logs and forest products shipped from points on the line of the Detroit & Mackinac Railway Company (plaintiff in error) to Alpena. These shipments were wholly intrastate, the road of plaintiff in error being located entirely within the state of Michigan.

The proceedings, up to the time of the former decision of this court are summarized in the opinion of Mr. Justice Holmes, filed on December 14, 1914, and reported in 235 U. S., page 402. As there stated, plaintiff in error had filed a bill of complaint in the state court to set aside the rates fixed by the Railroad Commission, and to enjoin their enforcement. This bill was dismissed and the rates affirmed by the state circuit court and on appeal, by the

Supreme Court of Michigan. An original bill of complaint was then filed in the district court of the United States for the eastern district of Michigan, in equity. This bill sought substantially the same relief as that sought by the bill of complaint previously filed in the state court. An application for a preliminary injunction was heard by three judges, as required by the Judicial Code, and on their denying the writ (see 203 Fed., 864), an appeal was taken to this court which affirmed the decree of the district court (235 U. S., 402). The district court thereupon, on December 28, 1914, dismissed the bill of complaint (R., 141, paragraph 27). During the pendency of the appeal to this court, and thereafter, the case was again before the Michigan Supreme Court on three different hearings, the opinions being reported in 182 Mich., 234; 184 Mich., 242, and 185 Mich., 649. The first of these resulted in the issuance of a writ of mandamus requiring the railroad company to put the rates into effect, and the second held the railroad company guilty of contempt of court for failing to comply with the writ of mandamus (R., 123-124). A freight tariff conforming to the orders of the Michigan Railroad Commission was finally, for the first time, filed by plaintiff in error, on February 18, 1915 (R., 124). A period of more than five years had thus elapsed between the taking effect of the orders of the Michigan Railroad Commission in November, 1909 (R., 140), and the compliance with these orders by the plaintiff in error, on February 18, 1915 (R., 124). During all this time the shippers of logs to Alpena had been compelled to pay under protest, rates higher than those fixed by the Commission, and five actions, of which this is one, were commenced in the state court (the circuit court for the county of Bay) in April, 1915 (R., 8), to recover the difference between the rates paid and the rates fixed by the Commission. The declaration was framed on the theory of a common law action of assumpsit (a modified form of common law practice still being in effect in Michigan), the common counts being added to special counts reciting the illegal exaction of excessive rates and the resulting duty to repay the excess to the shipper (R., 16-17). It was sought to recover only the overcharges paid after November 26, 1909, when the orders of the Railroad Commission became legally ef-

fective. Items aggregating $4,399.19, which had accrued prior to that date were abandoned on the trial (R., 89).

The five cases were consolidated for hearing and were heard by the trial judge without a jury. All substantial questions of fact in respect to the amounts paid and the difference between those amounts and the amounts collectible under the orders of the Michigan Railroad Commission were settled by an audit prior to trial, and a stipulation was filed adopting plaintiff's bill of particulars, with certain modifications, as a correct statement of the overcharges paid, subject to the legal contentions of the plaintiff in error (R., 40-43). An opinion was filed by the circuit judge (R., 123-26), overruling the objections and contentions of plaintiff in error and assessing damages at the sum of approximately $25,000. (The combined damages in the five cases aggregated about one hundred thousand dollars.) This opinion was later supplemented by more detailed findings of fact (R., 139-142). All of the dates and further details necessary for a complete history of the whole litigation can be found in this opinion and supplemental findings.

The judgment of the circuit court was reviewed by writ of error in the Supreme Court of Michigan and was there affirmed by an opinion filed September 27, 1917, and found on pages 268-283 of the record. This opinion has not yet been officially reported, but has been unofficially reported in volume 164 of the Northwestern Reporter, on page 528. The case is now here on writ of error.

Judgment was entered on November 27, 1916 (R., 148). The amendment of September 6, 1916, to Section 237 of the Judicial Code, took effect thirty days after its approval (Section 7 of the act). The decision of a motion to dismiss is, therefore, governed by the provisions of the new statute.

ANALYSIS OF QUESTIONS INVOLVED.

The assignment of errors is found on pages 295-305 of the record. For the sake of clearness, we will condense, paraphrase and analyze the allegations of error, and will then compare them with a similar condensation and analysis of the corresponding portions of the opinion of the Supreme Court of Michigan.

ANALYSIS OF ASSIGNMENTS OF ERROR.

1. (a) "To sustain this order (of the Michigan Railroad Commission) and grant the plaintiff (defendant in error) any relief on this order, would be a violation of the due process of law clause of the 14th amendment (of the Federal Constitution), and of the same clause of our own (the Michigan Constitution) (R., 298), because:

    1. There was no complaint to the Michigan Railroad Commission that the rates to Alpena, on logs, were unjust, unreasonable and excessive (R., 297).

    2. There was no hearing on any such allegation before the Michigan Railroad Commission (R., 297).

    3. No evidence was introduced to show that the rates to Alpena were unjust, unreasonable and excessive (R., 297).

    4. The complaint in that case related exclusively to the discrimination in favor of shipments as against Alpena (R., 297-98).

(b) The provision of this order (of the Michigan Railroad Commission) for a fifty-cent "refund" was an improper rebate and discrimination in favor of the Fletcher Paper Company (R., 298).

2. The Supreme Court of Michigan erred in affirming the ruling of the trial court in denying the motion to dismiss "on eighteen different grounds" (R., 298).

3. The Supreme Court of Michigan erred in affirming the rulings of the trial court in excluding certain proofs enumerated in the offer of evidence submitted by plaintiff in error (R., 298-300).

4. The Supreme Court of Michigan erred in affirming the opinion, findings of fact and conclusions of law of the trial judge (R., 300).

5. The Supreme Court of Michigan erred in affirming the action of the trial court in overruling the exceptions of plaintiff in error to the opinion and findings of fact and of law (R., 300).

6. The Supreme Court of Michigan erred in affirming the action of the trial court in passing on the special requests and exceptions of plaintiff in error (R., 300-301).

7. The Supreme Court of Michigan erred in overruling the motion for a new trial made in the trial court by the plaintiff in error (R., 301).

8. The Supreme Court of Michigan erred in overruling all of the assignments of error filed by the plaintiff in error in that court (R., 301).

9. The Supreme Court of Michigan erred in certain parts of its opinion as follows:

(a) In approving the nature of the remedy sought, the form of action selected, and the pleadings (R., 301-302).

(b) In approving the ruling of the trial judge in excluding evidence designed to reopen the question of the reasonableness of the rates (R., 302).

(c) In holding that the Commission rates were in legal effect prior to the issuance of the writ of mandamus, and the compliance therewith by plaintiff in error (R., 302).

(d) In holding that the temporary injunction, while permitting plaintiff in error to temporarily exact unlawful rates, did not legalize such exaction (R., 302).

(e) In holding that the provision for the fifty-cent differential was a "milling in transit rate," and not unlawful (R., 302-303).

10. "Act 300 of the Public Acts of Michigan, of 1909, as construed and applied in these cases, is in conflict with the 14th amendment of the Constitution of the United States in that the Detroit & Mackinac Railway Company is thereby deprived of its rights and property without due process of law, and is denied the equal protection of the laws" (R., 303).

11. The Michigan statute, "although fair on its face," was construed "with minds so unequal and oppressive as to amount to a practical denial by the state of the equal protection of the laws in violation of the 14th amendment of the Constitution of the United States" (R., 303-304).

12. The construction given to the state statute by the Michigan Supreme Court deprives plaintiff in error of its right to a judicial investigation of the reasonableness of the freight rates in question, and is in conflict with the due process of law clause of the 14th amendment of the Federal Constitution (R., 304).

13. The provision for the fifty-cent differential is in conflict with the Elkins Act and the Hepburn Act (R., 304-305).

14. In general, the invocation by plaintiff in error of the protection of the 14th amendment of the Federal Constitution was rejected and denied (R., 305).

ANALYSIS OF DECISION OF MICHIGAN SUPREME COURT.

First Point Decided (R., 279-280).

This point was raised by counsel as follows (see recitals of counsel's claims, R., 278-79):

As raised by plaintiff (defendant in error).

"Is a freight rate fixed by a state railroad commission considered as the lawful rate during chancery litigation to determine its legality?" (R., 279).

On this point the decision of the court was, in substance, as follows:

The action of the Michigan Railroad Commission established a legislative rate immediately in effect for the benefit of any and every shipper. The rates so fixed were not effective when and if an attack upon them failed, but were effective at once, pending such attack (R., 279-280).

Second Point Decided (R., 280).

As raised by defendant (plaintiff in error).

"Whether a complaint to the Michigan Railroad Commission is not a necessary preliminary to any action by a shipper or consignee to recover excessive rates or charges which have been already collected by carrier" (R., 278).

As raised by plaintiff (defendant in error).

"Is there any distinction between a common law action and a statutory action in such a case, and has there been any failure to select the proper remedy or to follow any statutory requirements which are necessary preliminaries to such an action" (R., 279).

The court decided this question substantially as follows:

(a) All attacks having failed, the Commission rate still stands. Defendant (plaintiff in error) having admittedly received rates higher than those fixed by the Commission, has money, which in equity and good conscience, it ought to restore to plaintiff (defendant in error) (R., 280).

(b) The money so due can be recovered in an action of assumpsit and it is wholly immaterial whether the declaration is based upon the statute and the action of the Commission, or upon the common counts (R., 280).

(c) The previous action of the Commission furnishes the necessary evidence of the unlawful character of the exaction. No statutory remedy is provided by the Michigan statute and no reapplication to the Commission is required as a preliminary to the commencement of suit, where as in this case, the action is in reliance upon and does not attack the previous order of the Commission (R., 280).

Third Point Decided.

As raised by defendant (plaintiff in error).

"Was the defendant entitled to prove on the trial that the rates and charges collected were just and reasonable" (R., 279).

As raised by plaintiff (defendant in error).

"Defendant's offer of proof" (R., 279).

The court decided this question substantially as follows:

The trial court properly denied the defendant (plaintiff in error) the right to retry the question of the reasonableness of the rates. This results from the fact that the recovery of the plaintiff (defendant in error) is in reliance upon the Commission rates, and not in the course of an attack upon them. The Commission is the rate maker and it would be wholly incongruous from an administrative standpoint to have successive juries or different courts and judges passing upon the reasonableness of a rate already fixed by the Commission (one such attack having been carried without success to the court of last resort (R., 280-281).

Fourth Point Decided.

As raised by plaintiff (defendant in error).

"Is the general rule changed by the delay of the Railroad Company in publishing and posting a new tariff in compliance with the orders of the Commission. Is the general rule affected by delay in the enforcement of the rate by mandamus" (R., 279).

The court decided this question substantially, as follows:

Defendant (plaintiff in error) cannot excuse its failure to give effect to the Commission rates by relying upon its own failure to post and publish them, because the Commission rates were conclusive whether or not they were in actual operation (R., 281).

Fifth Point Decided.

As raised by defendant (plaintiff in error).

"Whether an injunction issued to prevent an order of the Commission from taking effect, no bond being required from the carrier and no order impounding the overcharge does not prevent the order from having any force or effect until the Commission obtains and serves a mandamus commanding the carrier to put the order into effect" (R., 278).

As raised by plaintiff (defendant in error).

"Is the application of the general rule in this case changed by the injunction issued by the chancery court or the stipulation of the attorney general in respect thereto?" (R., 279).

This question was decided substantially as follows:

The temporary injunction secured upon representations afterwards held to be unfounded permitted defendant (plaintiff in error) to temporarily exact unlawful rates, but it did not legalize such exaction (R., 281).

Sixth Point Decided.

As raised by defendant (plaintiff in error).

"Is the rebate of fifty cents per thousand feet of logs, shipped into Alpena on the defendant railroad in case the manufactured product is shipped out thereon, a legal discrimination against those who shipped out by water?" (R., 279).

As raised by plaintiff (defendant in error).

"What are the plaintiff's rights in respect to an allowance for the outshipment of the manufactured product?" (R., 279).

The court decided this question substantially, as follows:

The fifty-cent differential was not an unlawful rebate, but was part of a lawful "milling in transit rate," and as such, authorized by the state statute (R., 281-282).

Seventh Point Decided.

The question of double damages, which was decided adversely to plaintiff (defendant in error) and is, therefore, of no present importance.

ANALYSIS OF QUESTIONS NOW BEFORE THIS COURT.

The questions now before this court may be grouped as follows, with reference to the above analysis of the assignments of error and of the opinion of the Supreme Court of Michigan:

I.

First, Fourth and Fifth Points Decided by Supreme Court of Michigan.

(*Assignment of Error,* Paragraphs 9 (c), 9 (d).

Did the Supreme Court of Michigan correctly construe the Michigan statute with respect to:

(a) The immediate effectiveness of a freight rate fixed by the Commission.

(b) The effect of delay in putting such a rate into actual operation, and

(c) The effect of a preliminary injunction suspending the operation of the rate.

II.

Second Point Decided by Supreme Court of Michigan.

(*Assignments of Error,* Paragraph 9 (a).

Questions of pleading and practice; whether the proper form of action was selected, the proper pleadings filed and all essential preliminaries complied with.

III.

Third Point Decided by Supreme Court of Michigan.

(*Assignments of Error,* Paragraphs 3, 9 (b), 12).

Should an opportunity have been given to plaintiff in error to reopen the question of the reasonableness of the rates, by submitting the evidence tendered in its offer of proof?

IV.

Sixth Point Decided by Supreme Court of Michigan.

(*Assignments of Error,* Paragraphs 1 (b), 9 (e), 13).

The validity of the provision for a fifty-cent differential.

The following questions raised by the assignments of error were not mentioned in the opinion of the Supreme Court of Michigan:

V.

(*Assignments of Error,* Paragraph 1 (a).

The validity of the original proceedings before the Michigan Railroad Commission.

VI.

(*Assignments of Error,* Paragraphs 10, 11 and 14).

The claim that the construction of the Michigan statute, adopted by the Michigan courts, constitutes a violation of the Federal Constitution.

The remaining paragraphs of the assignments of error are too vague to require notice.

ARGUMENT OF MOTION TO DISMISS.

The writ of error should be dismissed, not only because the record raises no question justifying the issuance of a writ of error, under the provisions of Section 237 of the Judicial Code, as amended by the Act of September 6, 1916, but also because there is no meritorious federal question of any kind. For convenience, instead of referring to the assignments of error consecutively by number, we will refer to the six questions now before this court by the numbers which we have given to them in our above "Analysis of Questions Now Before this Court."

Questions I and II are mere questions of local law. They involve nothing more than the construction of a Michigan statute by the Michigan courts in respect to issues of purely local importance. These questions not only fail to meet the requirements of Section 237 of the Judicial Code as amended, but also fail to raise anything which resembles a federal question.

In respect to question III (the right of plaintiff in error to reopen the question of the reasonableness of the rates), the decision of the Supreme Court of Michigan was based upon the argument (R., 280-281), that the Commission is the rate maker; that a previous attack upon the Commission rates had been unsuccessfully prosecuted to the court of last resort; and that:

> "it would be wholly incongruous from an administrative standpoint to have successive juries or different courts and judges passing upon the reasonableness of a rate already fixed by the Commission."

The contention made by plaintiff in error is in the nature of a third attempt to try adjudicated issues which this court held could not be tried a second time (see 235 U. S., 402). The rates in question were established by the Michigan Railroad Commission and were confirmed by the Supreme Court of Michigan, as the result and at the end of chancery pro-

ceedings designed to test their validity. A new proceeding in equity to set them aside and restrain their enforcement, was dismissed by the federal district court, in conformity with the opinion of this court. A third attempt to retry the same issues in the state court certainly raises no federal question, but merely involves the issues of *res judicata*. *A fortiori*, no question is raised which can be brought within the terms of Section 237 of the Judicial Code as amended.

Question number IV in the list above given (the validity of the fifty-cent differential), was decided by the Supreme Court of Michigan, largely as a question of fact. The court said (R., 282):

> "If a rebate was intended, or was provided for, a discrimination in favor of particular shippers, no difference of opinion would exist. This provision was not questioned in the bill filed by the defendant. In my opinion, there is no rebate, no discrimination, provided for in the order. A uniform rate is established, and with it, a milling in transit rate, not necessarily unlawful, and not shown here to be unlawful."

Neither the constitutionality of the state statute, nor any other federal question is raised in this connection. The Elkins act and the Hepburn act are not involved because the railroad operated by plaintiff in error is located entirely within the state of Michigan (see 235 U. S., 403), and no interstate traffic is involved in the case.

Question number V in the list above given (the validity of the proceedings before the Michigan Railroad Commission), involves another attempt to raise for the third time a question which this court would not permit to be raised for the second time. As Mr. Justice Holmes states (235 U. S., 406):

> "Whether the Commission exceeded its jurisdiction or not, as it purported to make orders, the Michigan court had jurisdiction and the appellant is bound by its decree."

The question involved is, therefore, merely a question of *res judicata.*

Question number VI, in the list above given, raises in varied forms the contention that the judgment sought to be reviewed violates the Federal Constitution in that it deprives the plaintiff in error of its rights and property without due process of law and denies the equal protection of the laws. In each case the attack is upon the construction, not the validity of the state statute. Paragraph 10, of the assignments of error, alleges that the state statute, *"as construed and applied in these cases,"* is in conflict with the fourteenth amendment (R., 303). Paragraph 11, alleges that the statute, *"although fair on its face, was so construed and applied,"* etc. (R., 304). Paragraph 14 consists of vague repetition (R., 305). The *validity* of the state statute has never been questioned.

To justify the issuance of a writ of error under Section 237 of the Judicial Code as amended, it must be shown that there is drawn in question the validity of a statute of or an authority exercised under the state of Michigan, on the ground of alleged repugnance to the Constitution, treaties or laws of the United States. It is elementary that:

> "the authority conferred on a court to hear and determine cases in a state is not the kind of authority referred to. * * * Otherwise, every judgment of the Supreme Court of a state would be reexaminable."

Bethell v. Demaret, 10 Wall., 537.
French v. Taylor, 199 U. S., 274 (277).
Philadelphia & R. Coal & I Co. v. Gilbert, 245 U. S., 162.
Stadelman v. Miner et al. (April 15, 1918); 38 Sup. Ct. Rep., 359.

It is equally elementary that the aid of this court can be invoked only where an act alleged to be repugnant to the

Constitution of the United States, has been decided by the state court to be valid, and not where an act admitted to be valid has been misconstrued by the court.

> *Commercial Bank v. Buckingham,* 5 How., 317 (342).
> *Ireland v. Woods,* 246 U. S., 323.

Other cases confirming the rule that the alleged misconstruction of a valid state statute by the state court will not support a writ of error under this or similar sections of the Judiciary Act, are:

> *Grand Gulf R. Co. v. Marshall,* 12 How., 165.
> *Ferry v. King County,* 141 U. S., 668.
> *Central Land Co. v. Laidley,* 159 U. S., 103 (112).
> See also *Ross v. Oregon,* 227 U. S., 150 (161).

Counsel has apparently attempted, by the language of the eleventh paragraph of the assignments of error (R., 303-4), to bring this case within the language of:

> *Yick Wo v. Hopkins,* 118 U. S., 373.

The *Yick Wo* case involved a writ of *habeas corpus,* and it was claimed that the petitioner was denied the "equal protection of the laws." It was held that this constitutional provision was designed to furnish protection against the exercise of "purely personal and arbitrary power," etc. Apparently, it was the invitation held out by the law itself to unjust and illegal discrimination between persons in similar circumstances, and not the judicial misconstruction of an otherwise valid law which was in the minds of the court. The case at bar involves no situation resembling that in the *Yick Wo* case.

ARGUMENT OF MOTION TO AFFIRM.

I.

Construction of Michigan Statute With Respect to the Effectiveness of the Freight Rate Fixed By the Michigan Railroad Commission.

The reasoning of the Supreme Court of Michigan is so clear, that any supporting argument seems unnecessary. The court said:

> "The Michigan Railroad Commission determined that certain rates theretofore published and exacted from shippers, by defendant, were unreasonable and ought not to be exacted and that certain other rates were and would be reasonable and proper to be exacted and should thereafter be exacted. The action of the Commission furnished for the benefit of any and every shipper, evidence that the old rates were illegal, the new rates reasonable and lawful. Although liable to be set aside by the courts, the result of what the Commission did was a legislative rate immediately in effect."

Michigan Cent. R. Co. v. Circuit Judge, 156 Mich., 459.
Mich. R. Comm. v. M. C. R. R., 159 Mich., 580.
D. & M. Ry. Co. v. Mich. R. Comm., 171 Mich., 335.
Michigan R. R. Comm. v. D. & M., 178 Mich., 230.
D. & M. R. Co. v. Mich. R. Comm., 240 U. S., 564.

> "This point, a vital one, may be restated. The rates fixed by the Commission were not effective when, and if, an attack upon them failed, but were effective at once and pending any attack upon them (R., 279-80). • • •

"Defendant does, indeed, say that the charges made by it were once approved, and were published as its rates, and, until suspended, were lawful rates; this is a part of an argument which asserts that only the voluntary action of the carrier or the writ of mandamus can put into operation rates fixed by the Commission. It makes little difference whether we do or do not say that the new rates were in effect, or whether we say they were in effect, but not in operation. The old rates were condemned as unreasonable, and the new ones approved as reasonable by the Commission, action which is now and was when these suits were begun, conclusive upon defendant.

"Instead of publishing and collecting rates fixed by the Commission, defendant sought and obtained an injunction restraining the Commission from putting into operation its said orders. The statute plainly recognizes the authority of a court of equity to so suspend the operation of the orders of the Commission. The case of the defendant is not, however, that of one prevented from doing something, pleading the prevention in excuse, or bar, of the consequences of its enforced nonaction. On the contrary, it is pleading its own action, pleading the injunction it sought for and secured upon representations held to be unfounded, as an excuse for retaining an exaction at all times *prima facie* unlawful and finally, in its own suit, conclusively determined to be unlawful. The temporary injunction permitted defendant, notwithstanding the orders of the Commission, to continue to take what its published tariffs called for, but it is not apparent and is not pointed out, how it legalized the exaction."

See:

Pac. Gas & Elec. Co. v. San Francisco (D. C.), 211 Fed., 202.

Spring Valley Water Co. v. San Francisco (C. C.), 165 Fed., 667.

Re Arkansas R. R. Rate (C. C.), 168 Fed., 720.
Bellamy v. Railway Co., 220 Fed., 876.
State v. Railway Co., 265 Mo., 646.
(R., 281).

II.

Questions of Pleading and Practice.

The questions here involved are so exclusively questions of local practice, in respect to which the decision of the state court is controlling, that no argument is required.

III.

Plaintiff's Right to Reopen the Question of the Reasonableness of the Rates.

The claim of defendant in error was based upon rates fixed by certain orders of the Michigan Railroad Commission, which, as held by the Supreme Court of Michigan, took immediate effect, "although liable to be set aside by the courts."

An action to set them aside was prosecuted by plaintiff in error and it was finally and conclusively defeated in the courts of last resort, both state and federal.

D. & M. Ry. Co. v. Mich. R. R. Comm., 171 Mich., 335.
D. & M. Ry. Co. v. Mich. R. R. Comm., 235 U. S., 402.

All statutory and constitutional remedies have, therefore, been exhausted and the rate still stands. No possible ground of judicial attack remains. As a judicial controversy, the subject is *res judicata*.

Plaintiff in error always had the right to again apply to the Railroad Commission for a modification of its previous orders because of changed conditions. This right was ex-

pressly saved by the original decision of the Supreme Court of Michigan (171 Mich., 365). Such action should have been taken immediately thereafter, if grounds of equitable relief were claimed to exist. Instead of following this course, plaintiff in error spent years in ill-advised and vindictive litigation, and now complains because it is not permitted to litigate an already adjudicated question as many times and in as many courts as it desires. Until the conclusion of new and successful proceedings before the Railroad Commission (which proceedings were commenced after the accrual of the entire claim of defendant in error, R., 113), the former commission rates remained in force. Any further judicial attack upon them was precluded by the decisions of this court and the Supreme Court of Michigan.

IV.

The Validity of the Provision for a Fifty-Cent Differential.

That part of the commission's order which granted the fifty-cent differential was as follows (R., 15):

> "Above rates to apply when the manufactured product is reshipped via defendant company's line and when not to be so reshipped that defendant company are authorized to collect, in addition to said rate, fifty cents per thousand feet, but if later reshipment is made over defendant company's line, they are to refund to such shipper the fifty cents per thousand feet collected."

This provision is not a "rebate," but a differential. It does not fix a rate and then *subtract* something from it if the lumber is reshipped by rail, but first fixes the rate and then *adds* something to it if the lumber is not reshipped by rail.

Provisions of this nature had become very common in the making of railroad rates prior to the date of the Commission's order. They originated from the desire to permit the manufacture of raw material at intermediate points without losing the benefit of through rates, and had, there-

fore, acquired the well known appellation of "milling-in-transit rates," or by abbreviation, "transit rates." This particular provision and the amount of the differential was borrowed by the Commission from the previous tariffs of the plaintiff in error railroad company. In referring to these tariffs, they are identified by the initials "M. R. C.," followed by a number. "M. R. C." means "Michigan Railroad Commission," and the number is the distinguishing number given to the tariff by the Commission. M. R. C. 205, which was the discriminatory tariff originally complained of, provided:

> "A refund of fifty cents per thousand feet on logs will be made when an equal amount of manufactured product is shipped out via the Detroit & Mackinac Railway" (see 171 Mich., 353).

M. R. C. 208, which was the mileage tariff used by the Commission as a basis for their order, provided that:

> "The rates named herein apply only when the manufactured product is to be reshipped via Detroit & Mackinac Railway" (see 171 Mich., 354).

The rate discrimination originally complained of lay in the fact that the railroad company had made a mileage tariff applicable to all points on its line except Alpena (M. R. C. 208), while it compelled Alpena shippers to pay the rates fixed by the special Alpena tariff (M. R. C. 205), which were much higher than the mileage rates. The Commission merely extended the application of the mileage tariff to Alpena and *added (not subtracted)* a differential of fifty cents per thousand feet in all cases where the manufactured product was not reshipped over the defendant's railroad.

If this provision for a differential was not valid, then no transit rates are valid.

The Michigan statute provides:

> "Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all

shippers for a like kind of traffic under similar circumstances and conditions, and shall be subject to the provisions of this act as to the printing and filing of the same; provided all such rates shall be under the supervision and regulation of the Commission."

Sec. 11 of Stat., C. L., 1915, Sec. 8119.

Such transit rates are now universally recognized as valid.

Watkins on Shippers and Carriers, Sec. 169.

The validity of the statutory provision itself cannot be questioned. The Supreme Court of Michigan merely held that the differential was not a rebate, but a milling-in-transit rate. They said:

"It will be perceived that the order of the Commission fixes freight rates to apply when manufactured product is reshipped via defendant's line, and when not so reshipped, the defendant is permitted to collect 50 cents per thousand feet additional, to be refunded however, if shipper later ships out the manufactured product or some of it. Ambiguous the order in some respects is, but not, I think, in respect to the rate. The order made a rate of $1 a thousand for logs in car loads moving 10 miles or less, and varying rates as the distance was increased. To them defendant was permitted to add 50 cents a thousand, no matter what the length of haul, if the product was not shipped out by its line. Defendant could take nothing from these rates. What it did was to enforce its old tariff of $3 and $3.25 per thousand feet, which tariff contained the provision for a refund of 50 cents per thousand when an 'equal amount of manufactured product' was shipped out over its line. Defendant says that:

" 'The rebates offered by the railroad company and the provision to the same effect in the order of the Railroad Commission' are a plain violation of the

act. If a rebate was intended, or was provided for, a discrimination in favor of particular shippers, no difference of opinion would exist. This provision was not questioned in the bill filed by the defendant. In my opinion, there is no rebate, no discrimination, provided for in the order. A uniform rate is established, and with it a milling-in-transit rate, not necessarily unlawful and not shown here to be unlawful. *Watkins on Shippers and Carriers* (2nd Ed.), Sec. 169; *Transp. of Wool, Hides and Pelts,* 23 Interst. Com. Comm. R., 151; *Transit Case,* 24 Interst. Com. Comm. R., 340; *Laurel Mills v. Railroad Co.,* 84 Miss., 349; 37 South., 134; 66 L. R. A., 453. The statute, section 11, reads:

> "'Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances and conditions * * *'" (R., 281-282).

In the following case, the Supreme Court of Mississippi said:

> "It is no longer open to question that milling-in-transit arrangements are recognized as valid agreements which may be lawfully entered into between shippers and carriers."
>
> *Laurel Mills v. R. R. Co.,* 84 Miss., 349; 37 So., 134 (137).

V.

Validity of Original Proceedings Before Michigan Railroad Commission.

This has been already sufficiently discussed in the motion to dismiss.

This court said:

> "Whether the Commission exceeded its jurisdiction or not, as it purported to make orders, the Michigan court had jurisdiction and the appellant is bound by its decree.
>
> *D. & M. R. Co. v. Mich. R. R. Comm.*, 235 U. S., 402 (406).

VI.

Construction of Michigan Statute.

In view of the elementary rule that the construction of a state statute in such a case as this is a matter for the state courts, nothing need be added to what was said in connection with the motion to dismiss.

ARGUMENT OF MOTION TO TRANSFER TO SUMMARY DOCKET.

The case is plainly of such a character as not to justify extended argument.

Respectfully submitted,

Edward S. Clark,
Counsel for Defendant in Error.

INDEX.

	PAGE
Answer to Motion to Dismiss, Affirm or Transfer to Summary Docket	1- 6

BRIEF FOR PLAINTIFF IN ERROR:

(a) Statement	7-13
(b) Proceedings after Orders of Commission	13-18
(c) Assignments of Error	18-47
1. M. R. C. Order October 19, 1909	19-24
2. Submission of Proofs	24-29
3. Filed and Posted Rates Control	30-34
4. Reparation—future rates	34-38
5. Act 300, P. A., 1909, Supersedes Common Law	38-40
6. Interstate Commerce Act	40-43
7. Findings of Fact and Conclusions of Law	29-30
8. Summary	43-47

List of All Cases Referred To.

	PAGES WHERE CITED.
Bacon v. Rutland R. R., 232 U. S., 134	22
Chicago Ry. v. Minnesota, 134 U. S., 418	21, 22
Chicago, etc., Ry. Co. v. Tompkins, 176 U. S., 167, 174.	22
Detroit R. R. Co. v. Michigan R. R. Com., 235 U. S., 402	22
Fox's Estate, 154 Mich., 5	47
Garrett Case, *Supra*	22

Grand Trunk R. R. v. Indiana R. R. Com., 221 U. S., 400, 403 22
Greiner v. Klein, 28 Mich., 12 47
Harrison v. Sager, 27 Mich., 476 47
Louisville & Nashville R. R. Co. v. Ohio Valley Co., 37 Sup. Court Rep., 120 26
Louis. & Nash. R. R. Co. v. Garrett, 231 U. S., 298, 313, and cases cited 22, 37
McChord v. L. & N. Ry. Co., 183 U. S., 483 34
Missouri Pac. Ry. v. Nebraska, 217 U. S., 196, 207 ... 22
Meeker & Co. v. Lehigh Valley R. R., 236 U. S., 412, 430 (and cases therein cited) 26
Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S., 510 .. 22, 23
Prentis v. Atlantic Coast Line, 211 U. S., 196, 207 ... 22
Penn. Refining Co. v. West N. Y. & P. R. R. Co., 208 U. S., 426 39
Poor Grain Co. v. Chicago, etc. Ry. Co., 12 I. C. C. R., 418, 425 37
Preston Nat. Bank v. Wayne Circuit, 142 Mich., 272 .. 47
Railroad Commission v. L. & N. R. R. Co., 140 Ga., 817 (6 a), 836 21
State of Georgia v. Western & Atlantic R. R., 138 Ga., 835 22
Southern Ry. Co. v. Atlanta Sand Co., 135 Ga., 33, 50. 22
San Joaquin Co. v. Stanslaus Co., 233 U. S., 459 22
Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426 42
Wadley Southern Ry. Co. v. Georgia, 235 U. S., 651 ... 21
68 Wash., 160, 167 .....
17 New Mexico, 557 .....
131 Pac. Rep., 980 .....
173 Fed. Rep., 957, 989 .....

In The

Supreme Court of the United States

October Term, 1918.

No. 336.

DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

FLETCHER PAPER COMPANY, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Michigan.

ANSWER TO MOTION TO DISMISS, AFFIRM, OR TRANSFER TO THE SUMMARY DOCKET.

The answer of the Detroit & Mackinac Railway Company, plaintiff in error, to the motion on behalf of defendant in error to dismiss, affirm or transfer this cause to the summary docket, respectfully represents to this Honorable Court:

1. Answering the first paragraph of the motion on behalf of defendant in error *to dismiss the writ of error* heretofore granted in this cause for the reason that this court has not jurisdiction thereof, plaintiff in error states that the provisions of Section 237 of the Judicial Code, as amended by the act of September 6, 1916, does not deprive the plaintiff in error of the right to have this court review, consider and determine the assignments of error alleged in this cause by the issuing of a writ of error to the Supreme Court of the state of Michigan.

This is one of five cases, each involving practically the same legal questions, which by stipulation were tried together in the circuit court for the county of Bay, state of Michigan, and while five separate appeals were made to the State Supreme Court, but one opinion was written by that court, which opinion in express terms controlled them all, and pursuant to such opinion the five judgments were separately affirmed.

Numerous questions are raised in the record common to all the cases, and errors are assigned which meet the requirements of such Judicial Code, and sufficiently involve federal questions to confer jurisdiction, as will appear more fully from the consideration and discussion of such questions.

On the trial of this cause in the circuit court objection was made on behalf of plaintiff in error to the introduction in evidence of a certain order made by the Michigan Railroad Commission, on the 19th day of October, 1909, for the reason that no complaint had been made to said commission pursuant to the statute, that the railroad rates and tariffs on the transportation of logs to the city of Alpena, state of Michigan, were unjust, unreasonable and excessive, and that no hearing was had on any such allegation before such Railroad Commission; that no evidence was introduced to show that the rates to Alpena were unjust, unreasonable and excessive, the complaint relating exclusively to an asserted discrimination in favor of ship-

ments as against lumber industries in the city of Alpena, and that to permit such order in evidence as a basis for a recovery in the action then pending in said court would be a violation of the Fourteenth Amendment of the Constitution and in violation of the provisions in such amendment with respect to the due process of law provision.

Objection was further made to the introduction of such order in evidence on the ground that it provided for an unlawful rebate of fifty cents per thousand feet on all logs so shipped, thereby discriminating in favor of the defendant in error to such extent as to make such order void and of no force and effect.

It was contended on behalf of plaintiff in error that all shippers living in the city of Alpena were entitled to the same rate on the transportation of logs to Alpena, regardless of the subsequent disposition of the manufactured product.

On the trial of said cause in the circuit court, counsel for plaintiff in error made an extended offer of proofs to the effect that for the years 1910 to 1915, inclusive, the plaintiff in error was entitled to earn on the valuation of its investment and property a sum and amount approximating at least eight per cent. Counsel offered to submit proofs establishing the fact that if such order was held effective it would deprive the plaintiff in error of sufficient revenue in the operation of its railroad to earn the amount named or any part thereof, and would ultimately result in the confiscation of its property without due process of law. A consideration of the offer of proofs entire is necessary in order to appreciate the materiality of such proofs, and to such offer reference now here is expressly made (F. P. Co. record, 297-300).

Other legal questions are raised by the assignments of error in this court, a consideration of which will establish the fact that the Supreme Court of the United States had jurisdiction to issue such writ of error and to review the determinations of the Michigan Supreme Court.

2. It is contended by defendant in error that this Honorable Court should affirm the judgment of the Supreme Court of the state of Michigan in this cause, for the reasons that it is manifest that such writ of error was taken for delay only and that the questions on which the decision of the cause depend are so frivolous as not to need further argument (defendant's brief, 1-2).

Counsel is wholly unjustified in asserting that the application for the writ of error to this Honorable Court was made for the purpose of delay only, as nothing in the proceedings heretofore taken throughout this entire litigation warrants such allegation. We insist many vexing legal questions are involved in these cases, all of which were thoroughly briefed, argued and considered in the circuit and supreme courts of the state of Michigan, and to allege they were and are frivolous is unwarranted in fact and in law.

The statutes of the state of Michigan prescribe with great particularity and minuteness the proceedings to be taken in the establishment of tariffs and rates for the transportation of forest products in the state of Michigan. It was contended from the very inception of this litigation that the demands of the defendant in error were in violation of the statutes of the state of Michigan and an infraction of the Constitution of the United States and of the state of Michigan. The circuit court for the county of Bay, in rendering judgment against the plaintiff in error and its associates, aggregating an amount in excess of $100,000, so rendered such judgments in opposition to every contention of counsel for plaintiff in error and in violation of the constitutional rights of this railroad company.

It was contended by counsel for plaintiff in error that it had the right to submit proofs showing that if this order of the Railroad Commission was held valid and plaintiff in error foreclosed from further proofs, the result would be a confiscation of the property of the plaintiff in error, and to say that these questions are raised for the purpose

of delay only and are frivolous, amounts to the assertion that the existence of plaintiff in error and its constitutional rights are matters unworthy of consideration.

In answering the allegations in the second paragraph of counsel's motion, we allege that the application for the writ of error was made in good faith and for the sole purpose of obtaining a just and legal determination of the questions involved in this cause.

3. The third paragraph of counsel's motion is to the effect that if this Honorable Court shall not dismiss the writ of error or affirm the judgments, that this proceeding and suit be transferred for hearing to the summary docket for the reason that the cause is of cush a character as not to justify extended argument.

If the plaintiff in error in this cause is entitled to a writ of error, vital and important questions of law are involved, as appears from the record and the assignments of error. To say that they are of such a character as not to justify extended argument is an unwarranted assumption on the part of counsel. The same allegations and assertions might be said respecting any cause appealed to this Honorable Court by writ of error.

It is not the desire of the plaintiff in error that any unusual or exceptional delay shall be had in the disposition of this case, but no reasons are advanced why it should not take its course with the other cases pending in this Court.

From the citations of law and the arguments of counsel in his brief following the motion hereinbefore referred to, it is apparent that the questions raised by the assignments of error involve questions of law entitled to thorough and exhaustive consideration by carefully prepared briefs. Plaintiff in error in this case and in each of the cases involving the same questions of law, have filed ample and sufficient bonds protecting the defendants in error, to the

end that if the contentions of the plaintiff in error are not finally supported by the decision of this Honorable Court, such defendants in error cannot sustain loss or damage. If they are entitled to an affirmance of the judgments they will receive the full amount thereof with lawful interest, and no exceptional conditions prevail whereby they should be advanced for hearing to the summary docket.

We respectfully submit that the motion to dismiss, affirm or transfer to the summary docket be denied by this Honorable Court.

James McNamara,
Detroit, Michigan,
Henry & Henry,
Alpena, Michigan,
Counsel for Plaintiff in Error.

In The

Supreme Court of the United States

October Term, 1918.

No. 336.

DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

FLETCHER PAPER COMPANY, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

The plaintiff in error is a Michigan railroad corporation, its main line extending from Bay City, Michigan, on the southerly, thence, northerly to the city of Cheboygan, passing through the city of Alpena, with branches and spurs extending into timbered sections available for the transportation of logs and other forest products, in carload lots, to mills in Alpena.

The defendant in error is a Michigan corporation with its manufacturing plants at the city of Alpena, Michigan, where for many years it has been engaged in the manufacture of lumber, paper pulp, paper and other materials made from forest products.

By Act 312, Laws of Michigan, 1907, railroad companies in the state of Michigan were required to file with the Michigan Railroad Commission (herein designated M. R. C.), and publish and post in their offices and depots, tariff rates for hauling logs, forest products and other commodities.

After this act became effective, the Detroit & Mackinac Ry. Co. (herein designated as D. & M. Ry. Co.), the plaintiff in error, complied with this law. In naming and quoting schedules or tariff rates for log transportations, we shall restrict the same to such logs and products as may be the subject of this controversy.

At and prior to the beginning of this suit, the plaintiff in error had on file and legally posted, tariff rates particularly informing all shippers and the public generally as to rates from and to all stations and places where it was transporting forest products.

February twentieth, 1909, a rate was scheduled, filed and posted as aforesaid for the shipment of logs in carload lots between the city of Alpena and one of the Fletcher Paper Co. mills, and designated as Fletcher Dam, at $5 per car each way. This was known and designated as tariff G. F. D. 573, M. R. C. 217.

In 1898 and 1899, the Fletcher Paper Co., one of the defendants in error, built a dam on Thunder Bay river, connected with a pulp mill for making paper, located about four miles northerly from Alpena, and to enable it to get its ground pulp to its paper mill in Alpena, the plaintiff in error in 1899, built and equipped a branch track from its main line to this dam, 2½ miles long, costing $5,371.35.

This dam and pulp mill were outside of the city limits of Alpena and outside of the plaintiff in error's station grounds and switching limits, and in order to haul logs from Alpena to the dam and paper pulp from the dam to Alpena, trains had to be hauled over about three miles of the main line and two and one-half miles of a branch line constructed especially for that purpose; all products hauled into the pulp mill requiring separate train movements.

From 1899 to February 20, 1909, plaintiff in error had given the Fletcher Paper Company a rate of $3 per car for products shipped into the pulp mill from Alpena and $2 per car for all out shipments. February 20, 1909, a tariff of $5 per car each way between Alpena and Fletcher Dam became effective and was legally filed and posted.

March 11, 1909, the plaintiff in error made and filed with the Michigan Railroad Commission a complaint alleging this rate to be "unfair" and "retaliatory," praying for an order requiring defendant to "desist from said violations of the acts referred to in said petition." Plaintiff in error filed a full and complete answer to this complaint, denying all relief prayed for. February 1, 1909, a rate was scheduled, filed and posted for carload shipments of logs to Alpena from the various places on the lines and branches of the plaintiff in error's railroad, each way from Alpena, providing for a minimum of 2,500 feet per car, this schedule being designated as M. R. C. 205.

The schedule last named fixed the rate on logs from designated places to Alpena, from north and south at $3 and $3.25 per thousand feet (except Paxton Station, $2.50 per M.). It provided for a refund of 50 cents per thousand feet when an equal amount of products were shipped out over plaintiff in error's road.

This tariff of rates had been approved by the Michigan Railroad Commission, thereby establishing specific rates on all kinds of logs to Alpena in carload lots.

April 19, 1909, Frank W. Gilchrist, Churchill Lumber Company and the Island Mill Lumber Company, three lumber concerns of the city of Alpena, made and filed with the Michigan Railroad Commission a complaint alleging that the scheduled tariff rate, M. R. C. 205, discriminated against Alpena shippers in favor of Cheboygan, a city at the northerly terminus of the D. & M. Ry., and that such tariff was "unjust and unduly discriminatory" and higher than the rates established by a certain schedule designated as M. R. C. 208. In such complaint prayer was made for an order requiring plaintiff in error to cease and desist from said violations of the acts referred to in such complaint and "to publish and file with the Michigan Railroad Commission rates shown on attached statement" (there being attached to such complaint a statement of rates proposed by said complainants).

Plaintiff in error filed an answer to this complaint, denying the allegations therein contained and alleging that the prayer for relief should be denied.

February 20, 1909, a rate in like manner was effectively scheduled, filed and posted for hauling logs in carload lots, naming a rate on a mileage basis without reference to the places from or to which the same were to be transported. This schedule contained a provision with reference to rates where manufactured products were shipped out on the plaintiff in error's road.

In like manner plaintiff in error filed answer to this complaint, denying the relief prayed for.

M. R. C. 208 had a very limited application because in addition to the specific rates on shipments to Alpena, specific rates were in force on logs shipped to Cheboygan and Onaway (stations along the D. & M. Ry), as established by a certain M. R. C. 199, effective January 19, 1909, on shipments of logs to Cheboygan, and by a certain other schedule designated M. R. C. 204, effective February 1, 1909, on shipments of logs to Onaway.

The rates established by M. R. C. 199 and 204, were less than the rates established by M. R. C. 205, on shipments to Aplena. The Cheboygan rates as far south as a station on said road designated as Case, were $1.80 per thousand, and further south, $2 per thousand. The Onaway rates were $1.50 per thousand from all stations except those less than ten miles from Onaway, which were $3 per car for 2,500 feet, or $1.20 per thousand.

After filing the complaints herein named and before the proofs were concluded before the Commission, the plaintiff in error filed and posted a new schedule of rates designated as M. R. C. 237, thereby *abolishing all discrimination in favor of Cheboygan,* eliminating all occasion for complaint in that particular.

Pending the hearing on the complaint before the Commission, this fact was made known; however, complainants insisted on prosecuting their complaint, asserting that M. R. C. 237 might not have been made in good faith.

The only charge left against the plaintiff in error for consideration by the Commission was that it was charging higher rates by the established specific rates, M. R. C. 205, than by the mileage rates named in the general tariff M. R. C. 208, and as the latter tariff did not apply to either Alpena, Cheboygan or Onaway, as by express terms transportation of logs to these places was governed by the specific rates duly and effectively filed and posted, M. R. C. 205; 199 and 237.

The testimony for the complaining parties was taken before the Commission June 3, 1909, and thereafter and on the 22nd of October, 1909, the Commission made an order on the so-called Gilchrist et al. complaint, wherein it stated:

> "Now, therefore, by virtue of the authority vested in us by law,
>
> "It is hereby ordered, that the Detroit & Mackinac Railway Company do publish and file and put into

operation so as to become effective twenty days from the date of the service of this order on defendant, a tariff for the transportation of logs in carload lots to the said city of Alpena, as follows:"

(Then followed a rate corresponding with M. R. C. 208.)
In the same order preliminary to the above quotation, the Commission found:

"That the matters alleged in the complaint are substantially true and that the rates charged for the transportation of logs in carload lots to the said city of Alpena are unjust, unreasonable and excessive, and that said rates should be reduced as hereinafter set forth."

Nothing was contained in the above order to the effect that the rates complained of were discriminatory.

Thereafter, ascertaining that their order of October 22 was wholly defective, the Michigan Railroad Commission having named no minimum amount for carlond lots, on November 3, 1909, without any further hearing and on their own initiative, they made a supplemental order fixing such minimum amount for carload lots at 2,500 feet per car.

October 19, 1909, on the complaint of the Fletcher Paper Co., as to M. R. C. 217, the Michigan Railroad Commission made an order wherein they alleged that it appeared to them that the switching charge or rate of $5 per car between Alpena and Fletcher Dam was unreasonable and unjustly discriminatory, and that a rate of $3.50 per car would be reasonable and just, made the following order:

"Now, therefore, by virtue of the authority vested in us by law,

"It is ordered, that the said defendant, the Detroit & Mackinac Railway Company, within twenty days from the date of service of a certified copy of

this order on it, file, publish and put in force a rate for switching charges between Alpena, Michigan, and Broadwell's Dam (otherwise designated as Fletcher Dam), of not to exceed $3.50 per car in each direction on all commodities.

"Ordered further, that M. R. C. 217, heretofore filed and published by said defendant, be canceled, and that said Detroit & Mackinac Railway Company cease and desist after said twenty days from charging more than $3.50 per car in each direction between Alpena, Michigan, and Broadwell's Dam, for any commodity."

We here call this court's attention to an error in the printed record, at page 296, where, in the first assignment of error, the date of the order of the Michigan Railroad Commission, D-188, reads "the 19th day of October, A. D. 1909," the same should read "the 22nd day of October, A. D. 1909." This correction is vitally important as other orders are involved in this cause, one of which does bear the date, October 19th, 1909.

PROCEEDINGS AFTER ORDERS OF COMMISSION.

On June 2, 1909, Act 300 of the Public Acts of 1909, was approved and by its terms, Act 312 of the Public Acts of 1907, of the state of Michigan, was repealed to the extent of conflict between the two acts.

The plaintiff in error did not file, publish and put into effect the schedule of rates provided for in the orders above designated.

The schedule of rates for the transportation of logs into Alpena, as filed and posted pursuant to Act 300 of the Public Acts of 1909, of the state of Michigan, prior to the orders last named, continued unchanged throughout the litigation which followed and until February 18, 1915.

It was the contention of the plaintiff in error that the orders made by the Michigan Railroad Commission were void and not enforcible. Therefore, plaintiff in error, being dissatisfied with such orders, on November 20, 1909, and within the time provided by Section 26, Act 300, P. A., 1909 (as subsequently amended), filed its bill of complaint in the circuit court for the county of Wayne, state of Michigan, in Chancery, wherein it alleged the reasons why such orders should not become effective or operative and why the plaintiff in error should not publish and file a schedule of rates pursuant to such orders. The bill of complaint alleged in detail the plaintiff in error's objections to the proposed rates, asserting that they were unlawful and unreasonable and were not subject to the regulation or control of the Michigan Railroad Commission; that they were in conflict with the constitutional provisions and laws of the United States and the state of Michigan in that they were in violation of the due process of law clause of the Fourteenth Amendment.

In order that plaintiff in error migth have the benefits of the law relative to a determination of the orders complained of, an injunction was prayed for to restrain the Commission from enforcing or attempting to enforce such orders or make them effective.

On reading and filing the bill of complaint, Judge Mandell of the Wayne circuit court for the state of Michigan, on the 20th day of November, 1909, made an order requiring the Commission to show cause on the 24th day of November, 1909, why such injunction should not issue.

In pursuance of this order, and on the 24th day of November, 1909, an injunction was duly issued out of the said Wayne Circuit Court directed to the Michigan Railroad Commission, therein, requiring it to:

> "desist and refrain from putting into operation or making effective the three orders of said Michigan Railroad Commission directed to the Detroit & Mac-

kinac Railway Company, said complainant, dated respectively October 22, 1909; October 19, 1909, and November 3, 1909, known and set forth in complainant's bill of complaint as Exhibits 1, 2 and 3, which said orders undertake to make a new tariff for the transportation of logs in carload lots to the city of Alpena over the Detroit & Mackinac Company's railroad, and to make new switching charges for said complainant Detroit & Mackinac Railway Company, other than the ones now in force and effective on said complainant's railroad, until the further order of this court."

On the 2nd of December, 1909, this injunction was duly served on the Michigan Railroad Commission, proof of service being made and filed.

December 2, 1909, the attorney general of the state of Michigan, Honorable John E. Bird, the legal representative of the Michigan Railroad Commission, met with Mr. James McNamara, general counsel for the plaintiff in error, in his office in Detroit, where they reviewed the entire situation, both as to the facts and the legal status of the controversy, at which time it was understood between them that the Commission's orders involved in this case should not become effective in any way until the case was finally heard upon its merits, and that the defendant should collect its present rates and the posted tariffs should remain in full force and effect until the case was finally disposed of on its merits, and pursuant to such understanding the following stipulation was made and filed in the cause:

"(Title of court and cause.)

It is hereby stipulated by and between the attorneys for the respective parties hereto that the application for injunction and the order to show cause made by said court, and the hearing thereon, may be and is hereby continued in its present state until

the final determination of said cause upon the merits thereof.

Dated, the 2d day of December, A. D. 1909.

John E. Bird,
Attorney General.

James McNamara,
Solicitor for Complainant."

On the 24th day of November, 1909, the time fixed by Judge Mandell of the Wayne circuit court, in his original order to show cause why an injunction should not issue, Mr. McNamara appeared for plaintiff in error, no one appearing on behalf of the Commission; thereupon, the hearing was continued to the 27th day of November, 1909, at which time the assistant attorney general of the state of Michigan requested that the matter be continued until the 2nd day of December, 1909, when the attorney general met with the general counsel of plaintiff in error and made the stipulation hereinbefore referred to.

Thereafter the legality of the orders of the Michigan Railrod Commission as hereinbefore set forth were litigated in the circuit court for the county of Wayne, Michigan, the Supreme Court of the state of Michigan, also in the District Court of the United States, and in the United States Supreme Court, resulting in decrees to the effect that such orders of the Michigan Railroad Commission were valid and enforcible, whereupon the plaintiff in error filed and published, pursuant to the statute hereinbefore referred to, tariff of rates for the transportation of forest products in pursuance of such orders, such rates being duly published and posted in its various tsations on, to-wit: the 15th day of February, 1915.

It would serve no useful purpose to review the litigation respecting the validity of these orders through the various courts in determining the assignments of error in this cause, and for that reason we refrain from a recital thereof in this statement.

On the 3rd day of April, 1915, the Fletcher Paper Company, defendant in error, the Island Mill Lumber Company, the Richardson Lumber Company, the Churchill Lumber Company and the Michigan Veneer Company, all lumbering concerns and corporations located at Alpena, Michigan, each commenced an action in the circuit court for the county of Bay, state of Michigan, against the D. & M. Ry. Co., the plaintiff in error, by filing and serving a declaration containing the common counts in *assumpsit* and a special count, thereby seeking to recover from plaintiff in error the difference between the rates exacted by the railroad company and the rates prescribed by the orders of the Railroad Commission.

As the questions involved in the five cases were practically the same, by stipulation the five cases were heard at one and the same time, resulting in judgments for the plaintiffs in such suits, as follows:

Fletcher Paper Company.....	$ 25,879.16
Island Mill & Lumber Company...	24,611.83
Richardson Lumber Company	28,318.80
Churchill Lumber Company	14,412.63
Michigan Veneer Company	16,122.89
Total	$109,345.31

Included in the judgments in these cases, the plaintiffs (defendants in error in the instant cases) recovered a rebate of 50 cents per thousand feet of logs in addition to the difference between the log rates collected by the railroad company and those prescribed by the Railroad Commission, as follows:

Fletcher Paper Co., 20,481,619 ft.....	$10,240
Island Mill Lbr. Co., 22,514,642 ft.....	11,257
Churchill Lumber Co., 21,685,371 ft.....	10,842
Richardson Lbr. Co., 16,680,379 ft.....	18,340
Michigan Veneer Co., 4,648,964 ft.....	2,324
Total	$43,003

The plaintiff in error appealed to the Supreme Court of the state of Michigan from the judgments so rendered against it by the five lumber company corporations, where the judgments were affirmed.

Thereafter application was made to the Supreme Court of the United States for writs of error in each case, and on filing bonds duly approved by this Court, writs of error to the Supreme Court of the state of Michigan were duly granted.

ASSIGNMENTS OF ERROR.

Many of the errors relied on for a reversal of the judgments rendered in the circuit court for the county of Bay, and affirmed by the Supreme Court of the state of Michigan, will not be considered in this brief. As other briefs will be filed in behalf of plaintiff in error, we shall confine ourselves to the consideration of such of the assignments of error as relate to the following questions:

(a) The validity of the orders of the Michigan Railroad Commission of date October 19, 1909; October 22, 1909, and November 3, 1909.

(b) The refusal of the court to permit plaintiff in error to submit additional proofs.

(c) The refusal of the circuit court for the county of Bay, state of Michigan, to consider and pass upon the proposed findings of fact and conclusions of law in behalf of plaintiff in error.

(d) Filed and posted rates control.

(e) Reparation—future rates.

(f) Act 300, P. A., 1909, supersedes the common law.

(g) Interstate Commerce Act.

M. R. C. Order October 19, 1909.

The order of the Railroad Commission of date October 19, 1909, was offered and received in evidence on the trial in the circuit court for the county of Bay, over the objections of counsel for plaintiff in error, and this is assigned as the first error relied upon in this court and is set forth in full in the record (296-297).

Regardless of the authority of the Michigan Railroad Commission under the complaint filed as the basis of this order, the making of the order depended upon the proofs submitted to the Commission, and in the absence of any evidence to support the making of such order it could not be of any force or effect.

When this order was offered in evidence the following objection was made to it:

> "Mr. Baker: I object to that order on the ground that there was no complaint to the Michigan Railroad Commission that the rates to Alpena on logs were unjust, unreasonable and excessive, and that there was no hearing on any such allegation before the Railroad Commission. No evidence was introduced to show that the rates to Alpena were unjust, unreasonable and excessive. The complaint in that case related exclusively to the discrimination in favor of shipments as against Alpena, and I insist that to sustain this order and grant the plaintiff any relief on this order would be a violation of the due process of law—of the Fourteenth Amendment and of

the same clause in our own constitution. I also make the objection that the provision in this order for a 50-cent refund was an improper rebate and discrimination in favor of the Fletcher Paper Company, and is absolutely void, in and of itself a violation of the Michigan act. Our position in regard to that is that all shippers living in Alpena are entitled to the same rate regardless of what they do with their products."

The court received the order in evidence and the judgments subsequently rendered in the five cases were predicated on the rates named in such order.

It must be remembered that at the time of the making of this order the plaintiff in error was hauling logs for the lumbermen of Alpena under a regularly posted and published tariff, and that it proceeded to haul forest products to Alpena and collect from the lumbermen the rates provided for in the posted and published tariffs.

After the making of this order by the Michigan Railroad Commission, the plaintiff in error diligently prosecuted its appeals from such order through the various courts herein before designated, and no action was taken on behalf of defendants in error to place themselves in a position where they were legally entitled to any other or different rate than that posted and published pursuant to Act 300 of the Public Acts of 1909.

The suit in the circuit court for the county of Wayne in Chancery and the appeal to the Supreme Court of the state of Michigan were expressly authorized by Section 26 of such Act, and the suit in the District Court of the United States for the Eastern District of Michigan in Equity, and the appeal to the Supreme Court of the United States were expressly authorized by the Constitution and laws of the United States. The plaintiff in error did not resort to any remedy, make any defense or invoke any jurisdiction it was not authorized to resort to, make, or invoke by such laws.

Act 300, Laws of 1909, of Michigan, regulating common carriers, is similar to the United States Interstate Commerce Act, and so far as every question of law involved in these cases are concerned the laws are identical, in fact the Michigan Act was framed to conform with the Interstate Commerce Act.

This is clearly indicated in the case of *Wadley Southern Ry. Co. v. Georgia, 235 U. S., 651.* Justice Lamar, in his opinion in this case, passes on the right of a common carrier to have a judicial determination on an order of the state commission and to determine its validity and reasonableness, and the right to invoke relief in the United States courts in such determination. At pages 659-661, he states:

> "It is, however, contended that those cases (referring to *209 U. S., 123, 163; Wilcox v. Consolidated Gas Co., 212 U. S., 19, 53, before cited)* related to penalties for charging rates higher than those which had been established by the legislature without any hearing having been given to carriers as to what were reasonable rates, and are applicable to a case like this where the order made after a full hearing had been given by the commission to the Wadley Southern. This contention would have been well founded if this and other hearings of a like nature before the commission had resulted in orders which had the characteristics of a final judgment, but this was not so if they were not conclusive.
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> *Chicago Ry. v. Minnesota, 134 U. S., 418, 458.*
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> "Their lawfulness was treated by the Georgia court in the present case as open to inquiry when the company was sued for a penalty. The question of their validity was also open to inquiry in equity proceedings in the state court where they would have been set aside if found to be arbitrary and unreasonable or to have violated some statutory or constitutional right.
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> *Railroad Commission v. L. & N. R. R. Co., 140 Georgia, 817 (6 a), 836.*

State of Georgia v. Western & Atlantic R. R., 138 Georgia, 835.
Southern Railway Co. v. Atlanta Sand Co., 135 Georgia, 33, 50.

"Such orders were also subject to attack in the Federal courts on the ground that the party affected had been unconstitutionally deprived of property.
Louis. & Nash. R. R. Co. v. Garrett, 231 U. S., 298, 313, and cases cited.

"And this right to a judicial determination exists whether the deprivation is by a rate statute passed without hearing (as in *Young & Consolidated Co.'s cases);* or by administrative orders of a commission made after a hearing (as in the *Garrett case, supra),* for rates made by the general assembly or administrative orders made by a commission are both legislative in their nature.
Garrett case, supra.
Grand Trunk R. R. v. Indiana Railroad Commission, 221 U. S., 400, 403.

"Any party affected by such legislative act is entitled by the due process clause to a judicial review of the question as to whether he has been thereby deprived of a right directed by the Constitution.
Chicago, etc. v. Minnesota, 134 U. S., 418, 458.
Chicago, etc. Ry. Co. v. Tompkins, 176 U. S., 167, 174.
Prentis v. Atlantic Coast Line, 211 U. S., 210.
Missouri Pacific Ry. v. Nebraska, 217 U. S., 196, 207.
Oregon R. R. Nav. Co. v. Fairchild, 224 U. S., 510.
San Joaquin Co. v. Stanslaus Co., 233 U. S., 459.
Bacon v. Rutland R. R., 232 U. S., 134.
Detroit R. R. Co. v. Michigan R. R. Com., 235 U. S., 402.

"The methods by which this right to a judicial review are secured, vary in different jurisdictions. In some states there is a provision that within a

designated time the order may be reviewed by the courts on the evidence submitted to the commission. *Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S., 510; 68 Wash., 160, 167; 17 New Mexico, 557; 131 Pac. Rep., 980; 173 Fed. Rep., 957, 989.*

In others by proceedings in equity.

"In the Federal courts the method of procedure when administrative orders are attacked as unconstitutional, is now regulated by Section 266 of the Judicial Code as amended (March 4, 1913 (c), 160, 37 Stat., 1013, 1014).

"But in whatever method in force, the right to a judicial review must be substantially adequate and safely available—but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at a risk of having to pay penalties so great that possibly it is better to yield to orders of uncertain legality rather than to ask for the protection of the law."

After all of the proofs had been submitted (including all of the proceedings had in the various courts testing the validity of the order of the Michigan Railroad Commission), the judge of the circuit court for the county of Bay, pursuant to the practice in the state of Michigan, was requested on behalf of plaintiff in error to pass specially upon forty-four requests for findings of fact and conclusions of law (R., 128-138). It became the duty of the judge of said circuit court to consider such requests and to indicate his decision and finding respecting the same, including therein the right to receive in evidence and to consider as a basis for the judgment in this case, the order of the Railroad Commission herein complained of.

Notwithstanding such duty, said circuit judge dismissed such requests in the briefest possible way by stating they were refused.

We contend, that the question of the right to receive in evidence the order of the Michigan Railroad Commission of October 19, 1909, has never received the judicial consideration which it was entitled to and that we have a right in this Court under our assignment of error in that behalf to have considered the admissibility of such order, and if this court shall determine that it was void and of no force and effect that will dispose of each of the five cases appealed to this Court by writ of error.

Submission of Proofs.

By the second assignment of error (R., 298-300), we insist that on the trial of this cause in the circuit court for the county of Bay, the offer of proofs on behalf of plaintiff in error should have received favorable consideration.

In order to appreciate the force of this assignment of error it must be remembered that the evidence bearing on the rates which the plaintiff in error was entitled to charge for the transportation of forest products, was concluded on the 15th day of August, 1910 (Rate R., 765).

The judgments rendered by the circuit court for the county of Bay, on the 27th of November, 1916, included the difference between the posted and published tariff of rates and the rates provided for in the order of the Railroad Commission of date October 19, 1909, to and including the 18th day of February, 1915. A period of 4½ years intervened within which no proofs were taken.

During this period of 4½ years the question as to the legality of the Commission's order was being litigated, and during the entire period of litigation no action was taken wherely the defendant could legally or consistently charge rates other than those named in its posted schedules.

During this 4½ years, which is a blank to this Court, so far as proofs go, many changes took place along the line of the Detroit & Mackinac Railway, as pointed out by Mr.

McNamara in his motion to dismiss, preceded by a statement of plaintiff in error's claim as hereinbefore stated.

Cost of material and labor had greatly increased during this period, while the forest products were growing less, and many reasons existed why plaintiff in error was entitled to a rate on the transportation of logs as high, if not higher, than as provided for in its posted schedule of rates.

Mr. Baker, in his offer of proofs, stated concise facts and figures which he had prepared with great care. That the Court might understand the importance of such evidence, such offer of proofs is set forth in full in the assignment of error now being considered, at pages 298-300 of the record in this Court and cause. The defendants in error (plaintiffs in the actions referred to in the circuit court for the county of Bay) objected to the introduction of such proofs, claiming that it was a matter of no importance whether evidence was available which would change conditions as prevailed at the time of making such order, and the circuit court sustained such objections and refused to permit the plaintiff in error to put in evidence the facts as outlined by Mr. Baker.

In view of the fact that the court excluded these proofs, it must be assumed in the consideration of this assignment of error that each and every fact alleged by Mr. Baker could have been established by competent evidence. Counsel for defendants in error rely upon Section 25 of Act 300, Public Acts of Michigan, for 1909, in support of the rejection of such proofs. This section reads as follows:

> "Section 25: All rates, fares, charges, classifications and joint rates fixed by the Commission, and all regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie* lawful and reasonable until finally found otherwise in an action brought for the purpose, pursuant to the provisions of Section 26 of this Act, or until

changed or modified by the Commission as provided for in Section 24 of this Act."

We insist that the *prima facie* evidence referred to in such section is subject to rebuttal evidence.

Meeker & Co. v. Lehigh Valley R. R., 236 U. S., 412, 430 (and cases therein cited).

The very language of the statute, *"shall be prima facie lawful and reasonable,"* carries with it the express implication that such rates may be assailed and proofs may be offered to overcome the *"prima facie"* lawfulness thereof.

The only effect of this statute is that it puts the burden of proof on the contesting parties.

In a suit under sub-section (g) of Section 10, to recover the reparation awarded by the Commission for an excessive charge, the order of the Commission is *prima facie* evidence only, and the carrier can defend by showing that the rates exacted by it were reasonable. If the carrier pays the award no suit can be maintained against it and any damage attributable to the overcharge must be taken to have been considered in the award.

Louisville & Nashville R. R. Co. v. Ohio Valley Co., 37 Sup. Court Rep., 120.

In that case the Court, by Justice Holmes, construing the Interstate Commerce Act, said:

"An award directing the carrier to pay to the complainant the sum to which he is entitled, is provided for by Section 16. By the same section, if the carrier does not comply in due time with the order, the complainant may sue in a state court—which implies that if the order has been complied with and the money paid, no suit can be maintained."

Carriers have a right to a determination by the Commission of questions of reparation for excessive rates or

charges, coupled with the further right to pay the reparation awarded and thereby avoid any further litigation.

These rights of carriers are directly opposed to the theory that a shipper or consignee can maintain an action without first seeking reparation.

If such suits could be maintained, carriers would be subject to varying and conflicting verdicts and judgments in which different views as to what were reasonable rates would prevail. The whole object of conferring power over rates on commissions, federal and state, would be defeated. Actions under the common law for the recovery of excessive rates would be restored and the administrative function of the commission eliminated.

When the Railroad Commission of the state of Michigan, on the 19th day of October, 1909, by their order, determined that:

> "The rates charged for the transportation of logs in carload lots to said city of Alpena are unjust, unreasonable and excessive, and that said rates should be reduced as hereinafter set forth,"

it arrived at such determination on the evidence before then submitted to it, and made such order on a condition of affairs existing between the railroad and the lumbermen at that identical time, namely, October 19, 1909.

On an appeal from the order to the circuit court for the county of Wayne, state of Michigan, proofs as to the reasonableness of the rates were taken showing the facts as they actually existed to and including the 5th day of August, 1910.

On the 7th day of April, 1915, these suits were instituted in the circuit court for the county of Bay and a judgment was obtained for the difference between the amounts exacted by the railroad, and the amounts provided for in the Railroad Commission's orders, to the 18th day of February, 1915.

If the order of the Michigan Railroad Commission was *prima facie* evidence during all of this period when no evidence had been taken, that the rates fixed by the order were legal and reasonable, why should not the plaintiff in error, if it could do so, overcome this *prima facie* condition by actual evidence and show that an entirely different condition of affairs prevailed subsequent to the making of the order, to the end that whatever was fair and reasonable might have been adjudicated and determined in these proceedings.

The Supreme Court of the state of Michigan affirmed the holding of the circuit court for the county of Bay, and in passing upon this question of the right to submit additional proofs, stated:

> "Everything essential to a recovery so far as the character of the exaction is concerned, has been determined by the Commission whose determination they rely upon. If it were otherwise, if the charges exacted by the defendant had been duly fixed according to the act and approved by the Commission, and they were attacked, a different question would be presented. In such a case the Commission and not the court should be first applied to. In the first place the Commission is the rate maker; in the second place it would be wholly incongruous from an administrative standpoint to have successive juries or different courts and judges passing upon the reasonableness of a rate already fixed by the Commission. To this effect are the decisions (here quoting U. S. and Federal decisions). These cases are authority also for the ruling of the trial court refusing to receive and consider offered evidence and denying defendant the right to try out in these cases the question of the reasonableness of the exactions it made."

We respectfully submit that it was error on the part of the Michigan courts to deprive the plaintiff in error of the

right to meet the demands of the defendants in error by evidence respecting the charges which this railroad company had a right to make in the matter of transportation of forest products to the city of Alpena.

Findings of Fact and Conclusions of Law.

Every question involved in this litigation upon which plaintiff in error relied, as set forth in its request for findings of fact and conclusions of law, is set forth in this record, at pages 128-138, inclusive.

Pursuant to the Constitution of the United States and the Constitution of the state of Michigan, every litigant is entitled to his day in court and cannot be deprived of his property without due process of law.

When the defendants in error in these several cases, filed their declarations in the circuit court for the county of Bay, on the third day of April, 1915, a demand was made for a bill of the particulars of their respective claims.

Finally, in the interest of simplifying the issues as much as possible, the parties, by their attorneys, stipulated to all the facts about which there could be no controversy, such as the number of feet of logs hauled, date of transportation and computations based on the contentions of the respective parties.

When these suits were tried in the circuit court, the plaintiff in error was entitled to a judicial determination of every lawful issue pursuant to the practice in the state of Michigan, and this was controlled by the Constitution of the state of Michigan, the statutes of the state of Michigan and the rules prescribed by the Supreme Court of the state of Michigan.

When the proofs had finally been submitted to the circuit court on behalf of plaintiff in error, the judge of the circuit

court who rendered judgment in these actions, was asked, pursuant to such practice, to pass upon the several questions involved as a basis for judgment, but instead of doing so, signed a paper prepared by the attorney for the defendants in error which amounted to nothing more than a refusal to pass upon such questions.

As illustrative of the court's failure to comply with the law and practice in that regard, we refer this Honorable Court to the paper filed in the circuit court for the county of Bay, on the 27th of November, 1916, headed:

> "Rulings on defendant's requests, etc.,"

and quoting from what follows:

> "The first request made by defednant is refused.
> "The second request is refused.
> "The third request is refused. Etc." (R., 145-148).

Error was assigned on the refusal of the court to pass specially upon plaintiff in error's requests, and we now here urge that plaintiff in error by reason thereof was by the judgment rendered in said circuit court and affirmed in the Michigan Supreme Court, deprived of its property without due process of law.

Filed and Posted Rates Control.

By the tenth assignment of error it is alleged as follows:

> "The plaintiff in error further says: That it is manifest on the record and proceedings aforesaid and the judgments and opinion of the Supreme Court of Michigan that Act 300 of the Public Acts of Michigan of 1909, as construed and applied in these cases is in conflict with the Fourteenth Amendment of the Constitution of the United States in that the Detroit & Mackinac Railway Company is thereby deprived

of it rights and property without due process of law and is denied the equal protection of the law" (R., 303).

Counsel for defendants in error assume to invoke so much and such parts of said Act 300 as justify them in collecting from the plaintiff in error an amount in each case equal to the excess collected by plaintiff in error on the transportation of logs, pursuant to the orders hereinbefore referred to, over and above the rates and tariffs filed and posted in pursuance of such act, without reference to the reasonableness of such rates and tariffs during the long period which ensued after the Michigan Railroad Commission made such orders.

The defendants in error, before such orders were made, paid the rates filed and posted pursuant to such act, and we insist that if such act is enforced defendants in error are restricted to such rates and tariffs as were filed and posted, and were not entitled to recover any excess thereof until new rates and tariffs were filed and posted.

The rates fixed by the Michigan Railroad Commission October 22nd, November 3rd, 1909, were not in force and effect until the defendant, in obedience to the orders of the commission of October 22nd, 1909, and the mandate of the Supreme Court of the state, December 20th, 1914, filed and published its schedule of rates on February 18th, 1915.

The railroad company was required and legally obliged to follow its old schedule of rates until a new one was filed and published. Any departure therefrom before the new schedule was effective would have been a plain violation of the express provisions of the Act.

Carriers are prohibited from engaging in the transportation of passengers or property:

"unless the rates, fares and charges upon which the same are transported by said carrier have been

filed and published in accordance with the provisions of this Act."

Sub-section (f), Sec. 10.

The sub-section further says:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith between the points named in such fares or charges which are specified in the tariff filed and in effect at the time."

"Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facilities in the transportation of persons or property except such as are specified in such tariff."

The imperative nature of these provisions is shown by Sections 16, 17, 18 and 19.

Carriers are prohibited from making any change in their schedules of rates except after ten days notice to the Commission and to the public.

Sub-section (b), Sec. 10.

"And no such rates, fares or charges or joint rates, fares or charges shall be discontinued except after giving such notice as is required for changing rates."

When the carrier gives notice of a proposed change in its rates, the Commission is authorized to suspend the taking effect of the new rates for a period not exceeding 45 days, and during that time to make an investigation giving the carrier a hearing and then make an order allowing or disallowing the rates proposed.

A carrier cannot voluntarily change its rates without submitting them to the judgment of the Commission and abiding by its decision. A carrier, however, can defeat an order of the Commission if it successfully invokes the jurisdiction of the court.

It is contended that the rates ordered by the Commission have the same force and effect as if established by the legislature itself.

If the petition or complaint conforms to the statute and a proper hearing is had, followed by an order justified by the complaint and hearing, and if no agreement, stipulation, or injunction supersedes the effect of the order, this would be true; but, in this case, the acts of the parties, the nature and terms of the complaints and orders and conference and stipulation with the attorney general, together with the injunction collectively and severally suspend and postpone the effectiveness of such orders as legislative action.

Counsel for defendants in error rely on the *Consolidated Gas Company case, 146 Fed., 150, 157; 212 U. S., 19,* and on the *Pacific Gas & Electric Co. v. San Francisco, 211 Fed., 202,* and on a number of other cases in which temporary injunctions were granted on the condition that the difference between the rates ordered by the legislature or by a commission, and the rates the companies were charging sohuld be impounded pending the litigation or that, a bond be given to secure the refunding of the difference to all consumers in case the companies were not successful in the litigation.

The protection of the consumers was secured by the direct action of the courts. In that way uniformity among all consumers was obtained.

In the instant case no such conditions were imposed, and the restraining order and injunction issued expressly for that purpose commanded the commission that it "do

absolutely desist and refrain from putting into operation or making effective," the orders of the commission.

The Railroad Commission cannot be enjoined from fixing rates as the orders of the Commission are harmless and have no force until they are put into operation and become effective.

McChord v. L. & N. Ry. Co., 183 U. S., 483.

In that case, the court, examining the Kentucky statute, found that it was not the duty of the Railroad Commission to enforce the rates it might fix, and that the method of enforcement should be by criminal prosecution instituted by the Commission.

The Michigan statute is the same, Sec. 41, with the additional remedy of "proceedings in mandamus, injunction or other appropriate civil remedies," Sec. 47. The Commission did not institute any criminal prosecution and did not apply for a mandamus until June 16, 1914, the rate being granted July 25th, 1914, *182 Mich., 234.*

Consideration must be given to the agreements between the parties. While the stipulation did not use the word "injunction," it used equally as forceful words, and the fact that after December 2, 1916, when the stipulation was made and the conference had, no further hearing was had on the order to "show cause," is conclusive as to the intent of the parties and the ineffectiveness of the orders.

Reparation—Future Rates.

It is conclusively certain that the orders of the Commission were not in force or effective until the mandamus was granted, and the rate itself was not effective until February 18th, 1915.

If a carrier has filed and published rates, fares or charges that are regarded by shippers or travelers as unreasonable and excessive, two remedies are provided by Act 300, which have these distinguishing features: one remedy is for the recovery of excessive rates that have been collected by the carrier in the past; and the other to compel the carrier to file and publish new and reasonable schedules of rates for the future.

These remedies are distinct from each other. Past excessive rates are recoverable on complaints under sub-section (g) of Sec. 10, praying for a refund of excess, or as more frequently called: Complaints for Reparation.

On such complaints the Commission is not authorized to make any order as to future rates. It merely fixes the amount of the excess and it had no power to issue an execution or any other process or order to enforce the payment. The claimant is authorized to bring an action on the award in the courts of this state. The findings of the Commission in making the award are made *prima facie* evidence, but the carrier can make a defense that the charges it had collected were reasonable and the whole issue of reasonableness is tried before the court, or court and jury, and the award of the Commission approved or disapproved.

It is expressly apparent that no action to recover excessive rates already collected by a carrier can be maintained until a complaint has been made to the Commission and an award of reparation obtained, otherwise the language of the Act is meaningless.

The primary jurisdiction of the Commission over the rates of carriers is exclusive. The jurisdiction of the courts cannot be invoked until the Commission has acted, and then only to enforce legal orders, subject to such other defenses as may be properly made.

On complaints to fix future rates under Sec. 22 of the Act, the Commission has no power to make awards for

reparation, and in the orders of the Commission of October 19th and 22nd, and November 3rd, 1909, no reparation was awarded.

Counsel for defendants in error have misapprehended the legal situation of this controversy. They assume that they can evade the requirements of the Act in regard to claims for reparation. One of the requirements is that the claim be submitted to the Commission before any action is brought. Another requirement is that complaints for reparation must be made to the Commission within six months from the time when the excessive rate was paid.

This is a plain statute of limitations, and no one can seriously contend that it can be evaded by bringing a common law action. If the plaintiff's action can be sustained as a common law action, it is open to common law defenses, and the whole question whether rates collected by the railroad were reasonable or not will have to be tried in this case wholly regardless of the decision of the Railroad Commission.

In a common law action the rates fixed by the order of October 22, 1909, would not be even *prima facie* reasonable.

They were not fixed on a complaint for reparation and are not within the provisions of sub-section (g), Sec. 10, which provides that in actions to recover awards made by the Commission "in the trial thereof the findings of the Commission shall be *prima facie* evidence of the truth of the facts found by it," etc.

On the trial of such an action the carrier can defend on the ground that the rates which the Commission, in making its award held were reasonable, were not so, as a matter of fact, and in that way the question of reasonableness would be fully tried on the merits.

The purpose of sub-section (g) is to prevent such trials as much as possible by requiring the question of the reasonableness of the rates actually collected by the carrier

to be first submitted to the Commission. The evident design of the statute is that in most cases the awards of the Commission will be sufficiently satisfactory to the carriers to cause them to pay the awards and make actions for the recovery to the same unnecessary.

The Interstate Commerce Commission has held that when a rate has been canceled and the lower rate has become effective, a carrier cannot voluntarily refund for the freight charges already collected and thus give him the benefit of the new rate on shipments that moved under the prior higher rate. The Commission alone has jurisdiction to authorize a refund to be made from charges collected on previous shipments.

> *Poor Grain Co. v. Chicago, etc. Ry. Co., 12 I. C. C. R., 418, 425.*

The distinctions between complaints for reparation and complaints to fix future rates was stated by the Supreme Court of the United States in

> *Louis. & Nash. R. R. Co. v. Garrett, 231 U. S., 298, 320.*

In that case the Kentucky Railroad Commission made two orders: one fixing rates for the future, and the other awarding reparation. The awards could be enforced by proceedings in court. The order fixing rates for the future was sustained as legislative. The court refused to pass on the order awarding reparation. Mr. Justice Hughes, for the court, said:

> "It thus appears that the two proceedings, though they were conducted at the same time, were distinct in their nature. The one resulted in a legislative rule for the future; in the other there was an award of specific sums of money to particular persons upon the basis of past transactions, and this award, according to the provisions of the statute, on being filed could be enforced by proceedings in the courts of the state. The persons in whose favor the award

was made were not parties to the suit, and we think that the court was right in declining to determine its validity."

Act 300, P. A., 1909, Supersedes Common Law.

The common law remedy for excessive charges by railroad companies for the carriage of freight have been superseded and abolished by sub-section (g) of Sec. 10 of the Act for the regulation of common carriers. Act 300, Laws 1909, pages 704, 715, as reenacted by Act No. 139, Laws 1911, pages 205, 209, reads as follows:

> "(g) Within six months after the delivery of any shipment of freight at destination, any person aggrieved may complain to the Commission that the charge exacted for the transportation of such freight between points in Michigan is irregular or exorbitant, and thereupon the Commission shall have power to investigate such complaint and to hear the same and to decide upon the merits thereof in the manner provided by Sec. 22 of this Act. If, upon such hearing, the Commission shall decide that the rate or charge exacted is irregular or exorbitant, it shall find what in its judgment would have been a reasonable rate or charge for the service complained of. If the rate or charge so found shall be less than the charge exacted, the carrier shall have the right to refund to the person paying such charge the amount so found to be excessive. In case of the refusal of the carrier to make such refund, the party aggrieved thereby may maintain an action in the courts of this state to recover the amount of such excessive charge as found by said Commission, and in the trial thereof the findings of the Commission shall be *prima facie* evidence of the truth of the facts found by it, and no carrier shall be permitted to avail itself of the defense of such action that the shipment involved was in fact made on the published tariff rate in

force at the time such shipment was made, but no carrier making a refund upon the order of the Commission or pursuant to a judgment of court, as herein provided, shall be liable for any penalty or forfeiture or subject to any prosecution under the laws of this state on account of making such refund."

Penn. Refining Co. v. West N. Y. & P. R. R. Co., 208 U. S., 426.

is a case where the Interstate Commerce Commission granted reparation, and in proceedings in the United States circuit court, under Sec. 16 of the Interstate Commerce Act, the award of the Commission was sustained and a judgment entered for the amount thereof and interest. This judgment was reversed by the United States circuit court of appeals, whose judgment was affirmed by the Supreme Court of the United States.

A reparation order by a state commission was sustained in *L. & N. R. R. Co. v. Finn, 235 U. S., 601.*

The cases of *Fanrsworth v. National Express Co., 166 Mich., 676,* and *Crowley Bros. v. Grand Trunk R. R. Co., 185 Mich., 482,* are not applicable, because in both of these cases the carriers sought to limit their liability by provisions inserted in the schedules or tariffs filed by the Michigan Railroad Commission.

The cases in the Supreme Court of the United States on which we rely were rate cases.

The question whether any rate is reasonable or excessive is by both the State Act and the Interstate Commerce Act placed within the jurisdiction of the Commission.

When a carrier files a schedule fixing a rate, no departure therefrom can be lawfully made; neither a less nor a greater rate can be charged or collected until a schedule of rates has been filed changing such rate.

Such new schedule can be obtained by complaints to the Commission, under Sec. 22 of Act 300.

After a hearing thereon, the Commission can fix the rate to be charged and order the carrier to file a schedule putting the rate or rates into effect.

The order of the Michigan Railroad Commission of October 22nd, 1909, set forth in the declaration of defendants in error, followed the statute and ordered the plaintiff in error to:

> "publish, file and put into operation, so as to become effective 20 days from the date of the service of this order on it, a tariff for the transportation of logs in carload lots to Alpena, as follows," etc.

At the common law an excessive charge by a common carrier could be recovered in an action at law wherein the whole question of the reasonableness of the charge would be tried and disposed of as a judicial question.

The decision arrived at would be *res adjudicata* as between the parties to the case and binding on them until a change in the facts surrounding the service or in the cause thereof required a new adjudication; it would temporarily and until there was a change in conditions, settle the rate of charge for the future.

It having become settled law that fixing rates for the future is a legislative and not a judicial question, and that the Interstate Commerce Commission and State Railroad and Corporation Commissions' Act as the ministerial agents of the legislative power, the remedies provided by legislation creating such commissions for excessive charges are necessarily exclusive of the old common law remedies.

Interstate Commerce Act.

The Michigan Act, regulating common carriers, was modeled after the Interstate Commerce Act, both making provisions for reparation.

The only difference between the Interstate Commerce Act and the Michigan Railroad Commission Act is condensed into sub-section (g) of Act 300 aforesaid.

The Federal provisions are in the more elaborate provisions of Sections 13 to 16 of the original Interstate Commerce Act as amended March 2nd, 1889.

The legislative provisions are similar in the following particulars:

1. The remedy given for excessive charges is a complaint to the Commission for reparation.

2. If the Commission finds the rates charged were excessive, reparation may be awarded for the excess.

3. If the carrier refuses to pay the award, an action can be brought for its recovery under the State Act in any circuit court of the proper county and under the Federal Act in the United States Circuit Court (now District Court in Equity), if a jury trial is essential on the law side of the court.

4. In these court actions the findings and orders of the Commission are *prima facie* evidence only, and the whole question whether the charges made by the carrier are reasonable or not may be litigated and determined.

There is only one difference between the State Act and the Federal Act. The State Act requires complaints for reparation to be made to the Commission within six months after the excessive charge was exacted by the carrier and paid to it by the claimant or shipper.

This in itself indicates a defined intention that the statutory remedy by complaint to the Commission was designed to be exclusive of the common law remedy which would otherwise prevail.

The United States Court, in an able opinion by Chief Justice White, held that the Act abolished and abrogated the common law remedies.

Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426.

Justice White, appreciating the rule that repeals by implication are not favored, logically and conclusively discriminated by showing that if the common law remedy still existed, the Interstate Commerce Act would be nullified, in that every claimant as to excessive charges would be privileged to pursue the carrier in numerous courts, and there would be as many different rules of reasonableness as there were cases and courts to decide them.

The purpose of the Act was to afford a preliminary investigation by the Commission and the judicial jurisdiction to be exercised in actions brought to recover the awards of the Commission.

Any parties in such controveries would be entitled to a judicial determination at some place in the proceedings, but the jurisdiction of the courts should not be invoked until the remedy before the Commission is exhausted, with the evident design that in the majority of cases resort to the courts would be unnecessary.

The recovery of excessive rates actually collected by the carrier could be consummated by making complaints for reparation under sub-section (6), Sec. 10, Act 300, and after a hearing on such complaint the Commission could order the carrier to refund any amount found to be excessive. If the carrier refused to pay such amount determined, suit could be instituted against the carrier to re-

cover any reparation ordered. On the trial of any such action the findings of the Commission are *prima facie* evidence only.

A shipper is not precluded from testing a rate fixed by the Commission as shown by schedule filed by carrier in obedience to the order of the Commission, but he can only do so before the Commission by making a complaint under said subdivision (g).

The defendants in error in these cases have made no such complaints and it is indefensible to contend in view of this legislation that they may resort to a common law action.

If common law actions are open to all shippers, the question of reasonableness of railroad freight rates can be taken out of the jurisdiction of the Railroad Commission and be tried with varying and conflicting results in inunmerable cases.

In considering this question, we especially request the Court to consider the opinion of Chief Justice White in the *Abilene Cotton case (204 U. S., 430-448)*.

It is a lengthy opinion and the full strength, force and application of the case cannot be comprehended without a careful perusal of it in its entirety.

Summary:

We undertake to summarize the argument and conclusions as follows:

1. At the common law an action could be maintained against a common carrier for excessive charges whether coercively exacted in advance or at the completion of the service.

2. The Interstate Commerce Act made it the duty of common carriers to charge only just and reasonable rates.

To enforce that duty they were required to establish, file and publish schedules of such rates, being prohibited from any departure therefrom until they were changed as authorized by the Act.

3. Shippers may assail the rates so established by complaints to the Commission on which the Commission might grant a departure from such rates in favor of the complainant alone and also require the carrier to establish new rates applicable to all shippers.

4. When such new rates have been established, shippers who have paid the old rates during the period when the carrier enforced its unreasonable schedule of rates, would be granted relief on complaints to the Commission for reparation.

5. The distinction between the two complaints is "that which, on the one hand, would arise from destroying the uniformity of rates which it was the purpose of the statute to secure, and on the other from enforcing that equality which the statute commands."

6. The provision in the Interstate Commerce Act that "nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act, are in addition to such remedies," cannot in reason be construed as continuing for the benefit of shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the Act. In other words, the Act cannot be held to destroy itself.

The provisions in the Federal Act undertakes to preserve "remedies," while a provision in the Michigan Act says nothing about remedies, but relates entirely and exclusively to the liability of common carriers. A provision in Section 40 reads as follows:

> "Provided that nothing herein contained shall be so construed as to abridge or in any wise lessen the

liability of any such common carrier as it now is under existing laws."

Preceding the above quotation in the same section is the following:

> "And no common carrier shall limit or change its common law liability by contract, or otherwise, as to its responsibility for the negligent act of its agents and servants with reference to property in its custody as a common carrier."

The entire object and purpose of both the Federal Act and the State Act is to preserve common law liabilities; they create no new liability, but they do provide for exclusive remedies which must be followed. Hence it is, that in the present case the plaintiff must first seek reparation as provided in sub-section (g) of Section 10 of the Michigan Act.

That the reasoning of the Supreme Court of the United States in the *Abilene Cotton Oil case (204 U. S., 430-448)* is applicable to the Michigan Act, is clearly demonstrated by the subsequent decisions of the United States Court which are cited in the case of *Loomis v. Lehigh Valley R. R. (240 U. S., 43)*. We call especial attention to the quotations on pages 49 and 50 of the case last cited.

The case of *Texas & Pacific Ry. v. American Tie Co. (234 U. S., 138)* is a case where the railroad company had a tariff on lumber in which cross ties were not mentioned, and the controversy arose over the question whether cross ties were or were not lumber, with great diversity of opinion among experts. The Court held:

> "1. That if there was no tariff on ties the railroad company could not carry them without first filing such a tariff.
>
> "2. That the question whether ties were or were not lumber was primarily a question for the Inter-

state Commerce Commission and not for the courts.

"3. That therefore the action of the plaintiff should have been dismissed in the court below for want of jurisdiction."

In the case of *Wolverine Brass Works v. Southern Pacific Ry. Co., 187 Mich., 393 (153 N. W., 778)*, this court, in an opinion by Justice Moore recognized the difference between an action wherein it is alleged that the rates collected by a carrier, as fixed by its tariffs, duly filed and published, are unreasonable and an action wherein it is alleged that the carrier has departed from its tariffs as filed and published. The one attacks the rates of the carrier and the other affirms and supports them and insists that they be observed.

Justice Moore quotes at length from *Gimbel Bros. v. Barrett (215 Fed., 1004)*, wherein the distinction is clearly pointed out between matters on the one hand primarily within the administrative powers of the commission, and, on the other hand matters which are not within the exclusive jurisdiction of the commission.

Both the case of *Wolverine Brass Works* (Michigan Supreme Court) and the case of *Gimbel Bros.* (Federal Court), relate to Interstate shippers and are governed by the Interstate Commerce Act; but the reasons which were advanced by the Supreme Court of the United States for its decision that common law remedies were abolished are very much stronger in the Michigan Act. The reparation provisions of sub-section (g) were not enacted until June 2, 1909.

The *Abilene Cotton Oil Company case (204 U. S., 430)* was decided February 25, 1907, and it must be assumed that the legislature when it modeled its reparation provisions after the Interstate Commerce Act and made them more positive and imperative, the intention was that they should have the same effect and the like construction.

Preston National Bank v. Wayne Circuit, 142 Mich., 272.
In re Fox's Estate, 154 Mich., 5.
Harrison v. Sager, 27 Mich., 476.
Greinier v. Klein, 28 Mich., 12.

Believing the questions herein discussed come within the assignments of error alleged in this Court and cause, and are controlling as to the issues involved, we respectfully request this Honorable Court to reverse the decision of the Supreme Court of the State of Michigan.

James McNamara,
Detroit, Michigan,
Henry & Henry,
Alpena, Michigan,
Counsel for
Plaintiff in Error.

[redacted]

Supreme Court of the United States

OCTOBER TERM 1918

No. 336

DETROIT & MACKINAC RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE FLETCHER PAPER COMPANY,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is writ of error to the Supreme Court of Michigan to review the judgment of that court affirming the judgment of the Circuit Court for the County of Bay, Nov. 27, 1916, of $25,788.76, in favor of the Fletcher Paper Company and against The Detroit and Mackinac Railway Company in an action of assumpsit for alleged excessive charges on logs shipped on the railroad to lumbermen, mill owners and others in Alpena.

There are four like cases, the aggregate, including interest and costs, being $98,957.03, as follows:

Fletcher Paper Co.	$25,788.13
Richardson Lumber Co.	28,239.65
Island Mill Lumber Co.	24,534.33
Churchill Lumber Co.	14,336.13
Michigan Veneer Co.	6,058.19
	$98,956.43

This is according to the statement of facts by the Supreme Court of Michigan, opinion by Justice Ostrander. (*Record, p.* 278.)

The judgments of the trial court aggregate $98,957.03 (*Record, p.* 145).

The judgment in favor of the Fletcher Paper Co. is $25,788.76 (*Record, p.* 148).

There is another case pending and undecided in the Circuit Court for the County of Alpena wherein the estate of Frank W. Gilchrist is plaintiff, and which is to abide the final result in the case of the Fletcher Paper Co. (*Record, p.* 160.)

The Michigan Act of 1909 re-creating the Michigan Railroad Commission was modeled on the Interstate Commerce Act after that act had received a settled construction by the Supreme Court of the United States. There is no material difference between the two acts. The provisions against rebates are the same; they are absolutely prohibited; and cannot be paid in any form, or by any device or subterfuge whatever.

The judgments against the plaintiffs in error, outside of interest charges and costs, consist of two items:

1. Charges exacted by the railway company in excess of the rates for hauling logs fixed by the Michigan Railroad Commission and which rates the courts, federal and state, had refused to disturb.
2. A refund of 50 cents per thousand feet of logs, from the rates the railroad company was authorized to collect, if the manufactured products were shipped out of Alpena on the railroad.

FLETCHER PAPER CO.

The judgment of $25,788.76 (*Record, p.* 148) in favor of the Fletcher Paper Co. consists of the following:

Excessive charges on logs.....	$12,484.06
Rebate of 50 cents per M.....	7,118.20
Excessive switching charges	6,186.50
	$25,788.76

Note—The first two items, amounting to $19,602.26, includes costs and interest charges.

The costs in the case of the Fletcher Paper Co. were six dollars more than in the other cases, which reduced the log freights as shown on page 86 from $12,490.06 to $12,484.06.

OUTLINE OF ARGUMENT.

In support of our application to Mr. Justice Day for the allowance of the writs of error in these cases we submitted the following memoranda which we here insert, the authorities cited being those on which we rely to reverse the judgments of the Supreme Court of Michigan.

Memoranda in Support of Application for Allowance of Writ of Error and Approval of Supersedeas Bond.

I.

The Detroit & Mackinac Railway Company having invoked the protection of the due process of law and the equal protection of the laws clauses of the Fourteenth Amendment in its plea and notice of special matter and its amendment of the same, there is no doubt about the right of the railroad company to a writ of error.

Am. Sugar, etc., Co. vs. Louisiana, 179 *U. S.* 89, 91.
Minn. & St. L. R. R. vs. Minnesota, 193 *U. S.* 53, 62.
Hendersonville, etc., Co. vs. Blue Ridge Ry., 243 *U. S.* 563-568.
St. L. I. Mt., etc., Ry. Co. vs. Starbird, 243 *U. S.* 592-599.

In the first of these cases the validity of a state statute was attacked.

The court by Justice Brown said:

> "As, however, the protection of the Fourteenth Amendment was invoked in the answer, and, as this defense is at least plausible on its face, the motion to dismiss must be denied."

The second case is precisely the same.

Here we call attention to our 10th, 11th and 12th assignments of error, in which we say that the Michigan Act

No. 300 P. A. 1909, as construed by the State Supreme Court, violates the Fourteenth Amendment.

In the third case cited above, the court by Justice Day said:

> "When the answer in this case set up the requirement of the bill of lading upon which suit was brought and the failure to comply with it, that was all that was necessary to fairly challenge the attention of the state courts to rights existing by virtue of a federal statute as to carriers to interstate commerce."

The action of the Fletcher Paper Company and of each of the other plaintiffs is based on orders of the Michigan Railroad Commission and as those orders were attacked in the notice of special matters of defense, filed by the railroad company, it is most assuredly entitled to the writ of error prayed.

II.

Where the opinion and judgment of a state court is based on the construction and meaning of a state statute, and no reference is made to any federal questions, yet, if the judgment of the court necessarily overruled and rejected federal questions, specially set up and claimed in the pleadings and proceedings and on the trial in the state court, the Supreme Court of the United States has jurisdiction.

> *St. L. I. Mt., etc., Ry. vs. Starbird*, 243 *U. S.* 592, 601-2.

III.

Rates within a state may be fixed by the state authorities at less than the rates on interstate shipment if there is no regulation by Congress to the contrary; but if Congress and the Interstate Commerce Commission have made a regulation which interferes with the freedom of state action, the state regulation is unconstitutional and void.

> *Lehigh Valley R. Co. vs. United States*, 243 *U. S.* 444.

In our reply brief we quoted the opinion of the Supreme Court of the United States in the above Lehigh Valley R. Co. case, and we now call attention to the fact that if the Detroit & Mackinac Railway Company pays these rebates, it and its officers and servants will be subject to heavy fines and penalties, and imprisonment for violating the Interstate Commerce Act.

There is no possible answer to our 13th assignment of error which presents this question, and it would be a curious miscarriage of justice to say that the plaintiff in error is not entitled to the judgment of the Supreme Court of the United States on the question.

IV.

There are a number of other federal questions that were specifically raised during the trial in the Bay Circuit Court, and are assigned as errors of that court and of the Supreme Court of Michigan.

In considering the application for a writ of error we respectfully request a perusal of the whole assignments of error.

JAMES MCNAMARA,
FRED A. BAKER,
Counsel for Detroit & Mackinac Ry. Co.

THE MICHIGAN ACT.

Act 300 *Public Acts* 1909, p. 704; 2 *C. L.* 1915, *Sections* 8109-8163, pp. 2906-2939.

The particular section involved in these cases is

Subsection (*g*) *Section* 10.

"Within six months after the delivery of any shipment of freight at destination any person aggrieved may complain to the commission that the charge exacted for the transportation of such freight between points in Michigan is irregular or exorbitant, and thereupon the commission shall have power to investigate such complaint, and to hear the same and to decide upon the merits thereof, in the manner

provided by section twenty-two of this act. If, upon such hearing, the commission shall decide that the rate or charge exacted is irregular or exorbitant it shall find what, in its judgment, would have been a reasonable rate or charge for the service complained of. If the rate or charge so found shall be less than the charge exacted the carrier shall have the right to refund to the person paying such charge the amount so found to be excessive. In case of the refusal of the carrier to make such refund, the party aggrieved thereby may maintain an action in the courts of this state to recover the amount of such excessive charge as found by said commission, and in the trial thereof the findings of the commission shall be prima facie evidence of the truth of the facts found by it, and no carrier shall be permitted to avail itself of the defense of such action that the shipment involved was in fact made on the published tariff rate in force at the time such shipment was made, but no carrier making a refund upon the order of the commission or pursuant to a judgment of court as herein provided, shall be liable for any penalty or forfeiture, or subject to any prosecution under the laws of this state on account of making such refund," etc.

These plaintiffs, defendants in error, made no applications under the above sub-section to the Michigan Railroad Commission and are not suing on awards made by that commission. Their actions are based on the theory that the questions involved are matters of state law as to which the decisions of the state courts are conclusive. This would be true if it were not for the fact that the business and traffic of the Detroit and Mackinac Railway Company is not confined to the state of Michigan. On the contrary, large shipments of lumber and other forest products are made from Alpena and other points on the railroad into other states and Canada. The Fletcher Paper Company ships paper to Toledo, Ohio, and Chicago, Illinois, and to many other points of destination in the United States.

Other mill owners and lumber men ship lumber and other forest products on the railroad to points all over the United States. The business of the railroad company is more largely of an inter-state commerce nature than of an intra-state character.

There is no answer to the proposition that the rulings of the Michigan Railroad Commission and the State Supreme Court sustaining the 50 cents refund as a milling in transit rate place a burden on interstate commerce, and being in conflict with the orders of the Interstate Commerce Commission and the legislation of Congress are void.

See 13th and 14th assignments of error, Record in Fletcher Paper Co. case. (*Record, pp.* 304-305.)

We respectfully submit that the motions to dismiss, affirm, or transfer to summary docket should be denied.

JAMES MCNAMARA,
FRED A. BAKER,
Counsel for Plaintiff in Error.

In The

Supreme Court of the United States

October Term, 1918.

No. 336.

DETROIT & MACKINAC RAILWAY COMPANY,
PLAINTIFF IN ERROR.

v.

FLETCHER PAPER COMPANY, DEFENDANT IN
ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

The brief for plaintiff in error just received contains certain inaccuracies of statement which need correction.

It is incorrectly stated, page 2, that "there is no material difference between" the Interstate Commerce Act and the Michigan Railroad Commission Act. There are marked dissimilarities between the two statutes. Section 14 of the Interstate Commerce Act, both in its original form and as

amended in 1906, gives the Interstate Commerce Commission power to make an award of damages to a shipper injured by a violation of the act on the part of the carrier.

There is no similar provision in the state statute and no similar powers are conferred upon the Michigan Railroad Commission. The provisions of the state statute most nearly resembling those of the Federal Act are Sub-section (g) of Section 10 (Compiled Laws of Michigan of 1915, Section 8118 (g)), and Sub-section (a) of Section 22 (Compiled Laws of Michigan, Section 8130 (a)). These sections are printed at length in the appendix at the end of this brief. The powers of the Michigan Railroad Commission are limited to the establishment of lawful rates, practices and regulations. Under Section 10 (g) all that the Commission can do is to find what, in its judgment, would be a reasonable rate or charge for the service complained of. Under Section 22 (a), the Commision establishes rates to be charged in the future. Under neither section is there any provision for an award of damages or order of reparation. That is left for the courts.

This was the question decided by the Michigan Supreme Court and referred to as the "second point decided," on pages 10 and 11 of the brief filed with our motion to dismiss in the *Fletcher Paper Company* case. As there stated, the Supreme Court of Michigan held that no "reparation" remedy is provided by the Michigan statute and that no reapplication to the Commision is required as a preliminary to the commencement of suit.

Counsel's reference to "rebates" is entirely misleading, as is also their attempt (page 2, of brief), to separate the judgment of the Fletcher Paper Company into three elements, one of which is characterized as a rebate. No such separation is proper. The judgment contained only two elements—first, excessive log freights; second, excessive switching charges. The order of the Michigan Railroad Commis-

sion did not provide for any rebate. It fixed a log rate applicable when the manufactured product was reshipped by the railroad, and then authorized the railroad company to add fifty cents per thousand feet to this rate if the manufactured product was not so reshipped. (Fletcher Paper Company Record, page 15.) If this differential (which counsel call a "rebate"), is invalid, the railroad company will lose money instead of gaining it. In computing the amount of the overcharge in each case, the basic rate actually used was that fixed by the Commission's order, viz.: The flat commission rate in all cases where the lumber was reshipped by rail and the flat commission rate, plus fifty cents per thousand feet in all cases where the lumber was not reshipped by rail. The differential feature of the rate which counsel now call a "rebate," was as fully adjudicated and validated by the previous decisions of this court and of the other federal and state courts as any other part of the rate. It was an integral part of it. As shown under the heading "Sixth Point decided," on page 13 of the brief filed with our motion to dismiss, the Supreme Court of Michigan held that this differential was not a rebate, but was a lwful "milling-in-transit rate," and, as such, authorized by the state statute. The section of the statute referred to is Section 11 (Compiled Laws of Michigan of 1915, Section 8119). This section is printed in full in the appendix to this brief.

ARGUMENT.

I. and II.

The cases cited on pages 3 and 4 of the brief for plaintiff in error, are not in point.

In *St. Louis, etc., R. Co. v. Starbird,* 243 U. S., 592 (at page 594), the three essential questions were stated as follows:

> (1) Was there a right involved which is the creation of a Federal statute (or otherwise within the terms of Section 237 of the Judicial Code)?
>
> (2) Was it sufficiently set up and called to the attention of the State court so as to be "especially set up or claimed?"
>
> (3) Was the decision against the right set up or claimed?

In the present case, we are raising questions of substance, not of form, and, therefore, the cases of *Minnesota & St. Louis R. R. v. Minnesota,* 193 U. S., 53, and *Hendersonville, etc., Co. v. Blue Ridge Ry.,* 243 U. S., 563, cited by counsel (which involved questions of pleading), are not important.

The case of *American Sugar Refining Co. v. Louisiana,* 179 U. S., 89, is distinguishable because the so-called Federal questions raised in the present case are not even "plausible upon their face." The *Starbird* case *(supra),* involved the construction of a Federal statute. None of the cases cited in the brief for plaintiff in error were within the operation of the amendmnet of September 6, 1916, to Section 237 of the Judicial Code.

III.

Lehigh Valley R. R. Co. v. United States, 243 U. S., 444, cited on page 4 of the brief of plaintiff in error, does not support counsel's argument. The present case does not involve any conflict between state and federal statutes or regulations. The Detroit & Mackinac Railway Company is an intrastate road. Every shipment involved in this case is an intrastate shipment. The argument that the mere carrying of a certain amount of interstate traffic by an intrastate road is sufficient to give this court jurisdiction of a controversy *not involving such traffic*, answers itself. The shipments involved here constituted no part of any interstate business. They were all shipments of logs from Michigan forests to Alpena, Michigan. The outgoing freight rates from Alpena are not in controversy.

Respectfully submitted,

Edward S. Clark,
Counsel for Defendant in Error.

APPENDIX.

Extracts From Michigan Statutes Referred to Above.

Section 10 (g) of Michigan Railroad Commission Law, Compiled Laws, 1915, Section 8118 (g).

"Within six months after the delivery of any shipment of freight at destination, any person aggrieved may complain to the commission that the charge exacted for the transportation of such freight between points in Michigan is irregular or exorbitant, and thereupon the commission shall have power to investigate such complaint, and to hear the same and to decide upon the merits thereof, in the manner provided by section twenty-two of this act. If, upon such hearing, the commission shall decide that the rate or charge exacted is irregular or exorbitant, it shall find what, in its judgment, would have been a reasonable rate or charge for the service complained of. If the rate or charge so found shall be less than the charge exacted, the carrier shall have the right to refund to the person paying such charge, the amount so found to be excessive. In case of the refusal of the carrier to make such refund, the party aggrieved thereby may maintain an action in the courts of this state to recover the amount of such excessive charge as found by said commission, and in the trial thereof, the findings of the commission shall be *prima facie* evidence of the truth of the facts found by it, and no carrier shall be permitted to avail itself of the defense of such action that the shipment involved was, in fact, made on the published tariff rate in force at the time such shipment was made, but no carrier making a refund upon the order of the commission or pursuant to a judgment of court, as herein provided, shall be liable for any penalty or forfeiture, or subject to any prosecution under the laws of this state on account of making such refund;"

Section 11 of the Michigan Railroad Commission Law, Compiled Laws, 1915, Section 8119.

"Nothing in this act shall be construed to prevent concentration, commodity, transit and other special contract rates, but all such rates shall be open to all shippers for a like kind of traffic under similar circumstances, and conditions, and shall be subject to the provisions of this Act as to the printing and the filing of the same: *Provided* all such rates shall be under the supervision and regulation of the commission."

Section 22 (a) of Michigan Railroad Commission Law, Compiled Laws, 1915, Section 8130 (a).

"Upon complaint in writing of any person, firm or corporation or association, or of any mercantile, agricultural or manufacturing society, or of any body politic or municipal organization, that any of the rates, fares, charges or classifications, or any joint rate or rates are in any respect unreasonable or unjustly discriminatory, or that any regulation or practice whatsoever affecting the transportation of persons or property or any service in connection therewith, is in any respect unreasonable or unjustly discriminatory, or that any service is inadequate, the commission shall notify the common carrier complained of that complaint has been made and shall furnish a copy of the said complaint with said notice, and twenty days after such notice has been given, the commission may proceed to investigate the same as hereinafter provided. Before proceeding to make the investigation, the commision shall give the said common carrier and the complainants at least ten days' notice of the time and place when and where such matters will be considered and determined, and said parties shall be entitled to be heard and shall have process to enforce the attendance of witnesses. Such hearings may be continued from time to time in the discretion of the commission. If, upon such investigation, the rate or rates, joint rate or rates, fares, charges or classifications, regulation, practice or service complained of shall be found to be unreasonable, inade-

quate or unjustly discriminatory, the commission shall have power to and it shall determine and by order fix and order substituted therefor, such rate or rates, joint rate or rates, fares and charges, as is or are just and reasonable, and which shall be the maximum to be charged in the future, and such classifications, regulation, practice or service as is or are just, reasonable and adequate, and which shall be imposed and followed or service rendered in future in lieu of that found to be unreasonable, inadequate, or unjustly discriminatory, and in either case, the commission shall make an order that the common carrier cease and desist from such violation, and shall conform to the regulation and practice so prescribed, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the common carrier affected thereby, which order shall, of its own force, take effect and become operative twenty days after the service thereof. All common carriers to which the order applies shall, on or before the date when such order becomes effective, make such changes in schedules on file as shall be necessary to make the same conform to such order, and no change shall, within two years thereafter, be made by any such common carrier in any such rates, fares or charges, or in any such joint rate or rates, without the approval of the commission. Certified copies of all other orders of the commission shall be delivered to the common carriers thereby affected in like manner, and the same shall take effect within such times thereafter as the commission shall prescribe;"

PROOF OF SERVICE.

State and Eastern District of Michigan, } ss.
County of Wayne. }

....., of Detroit, Michigan, being duly sworn, deposes and says that on the .....day of October, 1918, he served a supplemental brief for defendant in error, of which the annexed is a true copy, upon James McNamara, one of the counsel for plaintiff in error, by delivering the same during business hours at the office of said James McNamara, at 2026 Dime Bank Building, Detroit, to ...., who was then in charge of said office.

Deponent further says that on the ..... day of October, 1918, he served a copy thereof upon Fred A. Baker, one of the counsel for plaintiff in error, by delivering the same during business hours, at the office of said Fred A. Baker, at 526 Dime Bank Building, Detroit, to ....., who was then in charge of said office.

Deponent further says that on the ..... day of October, 1918, he served a copy of said brief upon Charles R. Henry, one of the counsel for plaintiff in error, by enclosing the same in a sealed envelope, plainly addressed, to said Henry, at Alpena, Michigan, that being his business address, and depositing the same in the United States postoffice in the city of Detroit, Michigan, with postage fully prepaid.

.....

Sworn to and subscribed before me this ..... day of October, 1918.

....., Notary Public, in and for Wayne County, Michigan.

My commission expires .....